UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 19- _____ Caption [use short title] _____

Motion for: Emergency Administrative Stay

Set forth below precise, complete statement of relief sought:

The President asks the Court to enter an order temporarily staying enforcement of a subpoena to his accountant for his records until the Court can decide his forthcoming motion for a stay pending appeal.

Trump v. Vance

MOVING PARTY: Donald J. Trump **OPPOSING PARTY:** Cyrus R. Vance, Jr.

☑ Plaintiff ☐ Defendant

☐ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Patrick Strawbridge **OPPOSING ATTORNEY:** Solomon Shinerock

[name of attorney, with firm, address, phone number and e-mail]

Consovoy McCarthy PLLC
Ten Post Office Square, 8th Floor South PMB #706 Boston, MA 02109
(703) 243-9423; patrick@consovoymccarthy.com

New York County District Attorney's Office
80 Centre Street, New York, NY 10013
(212) 335-9567; shinerocks@dany.nyc.gov

Court- Judge/ Agency appealed from: Marrero, J. SDNY

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain): _____

Opposing counsel's position on motion:
☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☑ Yes ☐ No ☐ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has this request for relief been made below? ☑ Yes ☐ No

Has this relief been previously sought in this court? ☐ Yes ☑ No

Requested return date and explanation of emergency:

1:00 PM on October 7, 2019
The President needs at least an administrative stay by that time because that is when the subpoena becomes due, and when the President thus faces irreparable injury from the disclosure of his records.

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date: _____

Signature of Moving Attorney:

/s/ Patrick Strawbridge **Date:** 10/7/2019 Service by: ☑ CM/ECF ☑ Other [Attach proof of service]

CERTIFICATE OF SERVICE

I declare under penalty of perjury that I filed this motion via the Court's CM/ECF system and emailed a true and correct copy to the following:

Jerry D. Bernstein
BLANK ROME LLP
1271 Avenue of the Americas
New York, NY 10020
(212) 885-5000
jbernstein@blankrome.com

Counsel for Mazars USA LLP

Solomon B. Shinerock
N.Y. CTY. DISTRICT ATTORNEY'S OFFICE
80 Centre Street
New York, NY 10013
(212) 335-9567
shinerocks@dany.nyc.gov

Counsel for Cyrus R. Vance, Jr.

Dated: October 7, 2019

s/ Patrick Strawbridge
Counsel for President Donald J. Trump

19-____-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DONALD J. TRUMP,

Plaintiff-Appellant,

v.

CYRUS R. VANCE, JR., in his official capacity as District Attorney of the County of New York; MAZARS USA, LLP,

Defendants-Appellees.

MEMORANDUM IN SUPPORT OF EMERGENCY MOTION FOR ADMINISTRATIVE STAY

Marc L. Mukasey
MUKASEY FRENCHMAN & SKLAROFF LLP
Two Grand Central Tower
140 East 45th Street, 17th Floor
New York, New York 10177
(212) 466-6400
marc.mukasey@mukaseylaw.com

Alan S. Futerfas
LAW OFFICES OF ALAN S. FUTERFAS
565 Fifth Ave., 7th Floor
New York, NY 10017
(212) 684-8400
asfuterfas@futerfaslaw.com

William S. Consovoy
Cameron T. Norris
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
will@consovoymccarthy.com
cam@consovoymccarthy.com

Patrick Strawbridge
CONSOVOY MCCARTHY PLLC
Ten Post Office Square
8th Floor South PMB #706
Boston, MA 02109
patrick@consovoymccarthy.com

Counsel for President Donald J. Trump

Movant, President Donald J. Trump, respectfully asks for a ruling on this emergency motion for an administrative stay **before 1:00 P.M. on October 7, 2019**. The President is entitled to an administrative stay of the grand-jury subpoena at issue here. The notion that the President would be subject to criminal process while he is challenging the constitutionality of that very process is self-refuting. Process was stayed while President Nixon challenged a criminal subpoena. It was stayed while President Clinton challenged whether he could be subjected to civil process. And it should be stayed here. Whether or not the Court ultimately agrees with the President's constitutional challenge to the subpoena, he is entitled to appellate review before his papers are forcibly disclosed to a state grand jury. Granting emergency relief before the challenged subpoena becomes enforceable at 1 P.M. on October 7 is the only way to ensure that does not happen. The President thus requests a ruling by that time; absent a ruling before 1 P.M. on October 7, the President will deem this motion denied and seek relief from the Supreme Court.[1]

* * *

For the first time in our nation's history, a county prosecutor has subjected the sitting President of the United States to criminal process. The District Attorney for New York County has issued a grand-jury subpoena for President Trump's private

[1] Per Local Rule 27.1(b), the President notified opposing counsel of this motion. Counsel for Cyrus R. Vance, Jr. opposes the requested relief and intends to file a response. Counsel for Mazars USA, LLP takes no position on the requested relief and does not intend to file a response.

financial records, for the express purpose of deciding whether to indict the President for state crimes.

No State has ever tried this before because the Constitution makes clear that a President cannot be "subject to the criminal process" while in office. Memorandum of Robert H. Bork for the United States Concerning the Vice President's Claim of Constitutional Immunity 17, *In re Proceedings of the Grand Jury Impaneled Dec. 5, 1972*, No. 73-cv-965 (D. Md.). "To wound [the President] by a criminal proceeding is to hamstring the operation of the whole governmental apparatus, both in foreign and domestic affairs," in violation of Article II. Memorandum from Robert G. Dixon, Jr., Asst. Att'y Gen., O.L.C., *Re: Amenability of the President, Vice President, and Other Civil Officers to Federal Criminal Prosecution While in Office* 30 (Sept. 24, 1973); *accord A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 O.L.C. Op. 222 (Oct. 16, 2000). And to allow a *State* to subject a President to criminal process would "arrest[] all the [executive powers] of the government, and … prostrat[e] it at the foot of the states," in violation of the Supremacy Clause. *M'Culloch v. Maryland*, 17 U.S. 316, 432 (1819).

Yet the District Attorney hopes this Court will never review his unprecedented departure from our constitutional tradition. Though he admits that his subpoena requests the *President's* records and investigates the *President's* conduct, the District Attorney issued the subpoena to the President's accountant, Mazars USA, LLP, instead of to the President himself. That way, Mazars would disclose the President's records before the President could assert his rights—unless the President could somehow

obtain a court order in the short window between the subpoena's issuance and due date. When the President and the Justice Department sought such an order from the district court, *see* Docs. 10-1, 22, 24, 32, the District Attorney refused to stay the subpoena any longer than 1:00 P.M. on October 7. Indeed, the District Attorney (in contravention of the agreed-upon stay that he drafted) refused to even provide this Court with two business days to decide whether a stay is warranted.[2] The District Attorney's objective could not be any clearer: he wants to obtain the President's financial records before this Court (and the Supreme Court) have any opportunity to review whether the subpoena is constitutional.

Earlier this morning, the district court denied the President's request for interim relief, his claim of constitutional immunity from state criminal process, and his request for a stay pending appeal. *See* D. Ct. Dkt. 35. It also dismissed his entire complaint. *Id.* It did so in a 75-page opinion.

The President filed an emergency notice of appeal with the district court, and he will soon file a motion for a stay pending appeal with this Court. For now, given the emergency that the District Attorney has created, the President simply asks this Court to administratively stay the subpoena to Mazars until this Court resolves the President's

[2] The parties' agreement stays enforcement of the subpoena "until 1:00 p.m. two business days after the Court rules on the pending motions to dismiss and for injunctive relief, or until 1:00 p.m. on Monday, October 7, 2019, whichever is sooner." D. Ct. Dkt. 28 at 1. The District Attorney interprets this agreement to expire at 1:00 p.m. on October 7 no matter what—even if it denies this Court an opportunity to review the district court's decision.

forthcoming motion for a stay pending appeal. The Court should also enter a briefing schedule on that motion. Given the subpoena's impending due date, the President respectfully asks for an administrative stay **before 1:00 P.M. on October 7, 2019**.

* * *

This Court has the power to issue stays and injunctions pending appeal. *See* Fed. R. App. P. 8. To ensure it can exercise that power, this Court can immediately grant an administrative stay—freezing the status quo until it can resolve the subsequent stay motion after full briefing, oral argument, and thoughtful consideration. *See* 28 U.S.C. §1651(a).[3] The Court can grant an administrative stay without making any determination about the underlying merits of the case or the likely success of the President's stay motion. *See Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1100 (11th Cir. 2004) ("[W]hile a party must 'state a claim' to obtain a 'traditional' injunction, there is no such requirement to obtain an All Writs Act injunction."); *In re Baldwin-United Corp.*, 770 F.2d 328, 336-39 (2d Cir. 1985) ("[T]hat the injunction was necessary to preserve [the court's]

[3] *E.g.*, *Irani v. United States*, 448 F.3d 507, 509 (2d Cir. 2006) (explaining that the Court had administratively stayed a subpoena "pending a hearing on the Movants' stay motion"); *Becker v. United States*, 451 U.S. 1306, 1309 (1981) (Rehnquist, J., in chambers) (staying a subpoena pending certiorari and explaining that he had previously granted an administrative stay "to protect the ultimate jurisdiction of this Court" (citing 28 U.S.C. §1651(a))); *In re Subpeona Served Upon Comptroller of Currency*, No. 91-5427, 1991 WL 285327, at *1 (D.C. Cir. Dec. 31, 1991) (administratively staying subpoenas "to give the court sufficient opportunity to consider the merits of the motions for an immediate stay pending appeal"); *Arnold v. Garlock, Inc.*, 278 F.3d 426, 433 (5th Cir. 2001) ("Because of the 'emergency' nature of [appellant's] motions, we implemented a temporary stay in each case to provide sufficient time to fairly consider whether a formal stay pending appeal should issue.")

jurisdiction … would be sufficient … under the All-Writs Act," for which "the requirements that Fed. R. Civ. P. 65 prescribes for the issuance of preliminary injunctions" do not apply); *Cobell v. Norton*, 2004 WL 603456, at *1 (D.C. Cir. Mar. 24, 2004) ("The purpose of [an] administrative stay is to give the court sufficient opportunity to consider the merits of [a] motion for a stay pending appeal and should not be construed in any way as a ruling on the merits").[4]

An administrative stay is warranted. This appeal raises momentous questions of first impression about the scope of the President's constitutional immunity from state criminal process. As the U.S. Department of Justice explained in its statement of interest below, temporary relief is needed to provide "appropriate briefing of the weighty constitutional issues involved" and "the type of considered deliberation appropriate for the serious constitutional issues at stake in this proceeding." D. Ct. Dkt. 32 at 6-7. The "'high respect that is owed to the office of the Chief Executive'" requires no less. *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 385 (2004) (quoting *Clinton v. Jones*, 520 U.S. 681, 707 (1997)). That is why courts routinely grant similar relief in cases involving the President. *See, e.g.*, *United States v. Nixon*, 418 U.S. 683, 714 (1974) ("Enforcement of the

[4] The Anti-Injunction Act—which sometimes bars federal courts from "grant[ing] an injunction to stay proceedings in a State court," 28 U.S.C. §2283—does not apply to administrative stays. *See Baldwin-United*, 770 F.2d at 335-36. That's because the Act has an explicit exception for injunctions "in aid of [the federal court's] jurisdiction." §2283. The Act also has no application to this case whatsoever because, among other reasons, the President is suing under 42 U.S.C. §1983. *See Mitchum v. Foster*, 407 U.S. 225 (1972).

subpoena duces tecum [issued to President Nixon] was stayed pending this Court's resolution of the issues raised by the petitions for certiorari."); *Dellums v. Powell*, 561 F.2d 242, 245 n.7 (D.C. Cir. 1977) (explaining that the court, in a case where former President Nixon challenged a third-party subpoena, "granted an 'administrative stay' so that it could more fully consider" the President's motion for a stay pending appeal). Indeed, in two similar cases involving third-party subpoenas for the President's records, the U.S. House of Representatives agreed to stay its subpoenas until the court of appeals reached a final decision on the President's claims. *See* CA2 Doc. 5-2, *Trump v. Deutsche Bank AG*, No. 19-1540 (2d Cir.); CADC Doc. 1789081, *Trump v. Mazars USA, LLP*, No. 19-5142 (D.C. Cir.). The District Attorney's refusal to extend that minimal courtesy here is indefensible.

An administrative stay, moreover, is needed here to prevent irreparable harm to the President. Without one, Mazars will disclose reams of the President's confidential financial information to the District Attorney on October 7. This "disclosure of private, confidential information" to the government "'is the quintessential type of irreparable harm that cannot be compensated or undone by money damages.'" *Airbnb, Inc. v. City of New York*, 2019 WL 91990, at *23 (S.D.N.Y. Jan. 3, 2019) (quoting *Hirschfeld v. Stone*, 193 F.R.D. 175, 187 (S.D.N.Y. 2000)); *accord U.S. Servicemen's Fund v. Eastland*, 488 F.2d 1252, 1256 (D.C. Cir. 1973) (staying a congressional subpoena to a third-party custodian because "the merits of the case[] are of such significance that they require … consideration and deliberation" and "unless a stay is granted … irreparable harm will

be suffered by appellants, at [the subpoena's due date of] 10:00 a. m. this morning"); *Araneta v. United States*, 478 U.S. 1301, 1304-05 (1986) (Burger, C.J., in chambers) (staying an order requiring applicants to testify before a grand jury because "[t]he Government and the public plainly have a strong interest in moving forward expeditiously with a grand jury investigation, but on balance the risk of injury to the applicants could well be irreparable and the injury to the Government will likely be no more than the inconvenience of delay").

Even if the District Attorney returned, destroyed, or never used the information he receives from Mazars, nothing could "return[] [the parties] to the positions they previously occupied." *Brenntag Int'l Chemicals, Inc. v. Bank of India*, 175 F.3d 245, 249 (2d Cir. 1999); *see Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bishop*, 839 F. Supp. 68, 72 (D. Me. 1993) ("Once confidentiality is breached, the harm is done and cannot be undone…. There is no way to recapture and remove from the knowledge of others information improperly disclosed"); *Becker v. United States*, 451 U.S. 1306, 1311 (1981) (Rehnquist, J., in chambers) ("Much of the harm applicants contend will result from turning their videotapes over to the IRS will not be remediable if a stay is denied here and applicants eventually prevail."). Just as "attorneys cannot unlearn what has been disclosed to them in discovery," *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 165 (2d Cir. 1992), neither the District Attorney's office nor the grand jury will be able to "erase from its memory" information illegally obtained during the course of an investigation, *In re Grand Jury Matter #3*, 847 F.3d 157, 164 (3d Cir. 2017).

There will be "no way to unscramble the egg scrambled by the disclosure." *In re Ford Motor Co.*, 110 F.3d 954, 963 (3d. Cir. 1997); *accord Maness v. Meyers*, 419 U.S. 449, 460 (1975) ("Compliance could cause irreparable injury because appellate courts cannot always 'unring the bell' once the information has been released. Subsequent appellate vindication does not necessarily … totally repair[] the error.").

At bottom, this is a claim of immunity to criminal process by the President of the United States. Until the Court resolves this claim, it cannot allow the President to be *subjected to* the very process he is challenging. Doing so would effectively reject the President's claim without giving him a chance to be heard—a result that is flatly inconsistent with "the special solicitude due to claims alleging a threatened breach of essential Presidential prerogatives under the separation of powers." *Nixon v. Fitzgerald*, 457 U.S. 731, 742-43 (1982). Courts should not "'proceed against the president as against an ordinary individual'" and must "accord[] that high degree of respect due the President of the United States." *Nixon*, 418 U.S. at 714-15. Denying this motion is thus "peculiarly inappropriate" and "would present an unnecessary occasion for constitutional confrontation." *Id.* at 691-92.[5]

[5] While the President is still reviewing the district court's 75-page opinion, the court apparently invoked *Younger* abstention to justify dismissing the President's complaint. As the President and the Justice Department explained, *Younger* has no application here. *See* D. Ct. Dkt. 22 at 13-17; D. Ct. Dkt. 32 at 9-15. The notion that *the President of the United States* must litigate his federal constitutional claim in *state* court would create "'unnecessary conflict between state and federal governments,'" not avoid it. *United States v. Morros*, 268 F.3d 695, 707 (9th Cir. 2001). Well-recognized exceptions to *Younger* including "irreparable harm" and "harassment" also apply here. *See Page v. King*, 932F.3d 898, 904 (9th Cir. 2019); *Black Jack Distributors, Inc. v. Beame*, 433 F. Supp.

* * *

For these reasons, the President asks the Court to enter an administrative stay **before 1:00 P.M. on October 7, 2019**. Specifically, this Court should temporarily stay enforcement of the District Attorney's subpoena to Mazars until this Court resolves the President's forthcoming motion for a stay pending appeal. The Court should also enter an expedited briefing schedule for that motion. The President proposes the following:

- The President's motion for a stay pending appeal will be filed by October 10, 2019.
- Mazars' and the District Attorney's oppositions, if any, will be filed by October 17, 2019.
- The President's reply will be filed by October 21, 2019.
- Oral argument should be held as soon as the Court deems practicable.

The President greatly appreciates the Court's prompt attention to this matter.

1297, 1304-07 (S.D.N.Y. 1977). Nor does *Younger* even apply to grand-jury subpoenas issued by state prosecutors, *see Monaghan v. Deakins*, 798 F.2d 632, 637 (3d Cir. 1986), *vacated in other part*, 484 U.S. 193 (1988)—an question that has split the circuits, as the district court acknowledged.

Dated: October 7, 2019

Respectfully submitted,

s/ Patrick Strawbridge

Marc L. Mukasey
MUKASEY FRENCHMAN & SKLAROFF LLP
Two Grand Central Tower
140 East 45th Street, 17th Floor
New York, New York 10177
(212) 466-6400
marc.mukasey@mukaseylaw.com

Alan S. Futerfas
LAW OFFICES OF ALAN S. FUTERFAS
565 Fifth Ave., 7th Floor
New York, NY 10017
(212) 684-8400
asfuterfas@futerfaslaw.com

William S. Consovoy
Cameron T. Norris
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
will@consovoymccarthy.com
cam@consovoymccarthy.com

Patrick Strawbridge
CONSOVOY MCCARTHY PLLC
Ten Post Office Square
8th Floor South PMB #706
Boston, MA 02109
patrick@consovoymccarthy.com

Counsel for President Donald J. Trump

ATTACHMENTS

Exhibit	Document	D.Ct. Dkt.
A	District Court Order	35
B	Subpoena	6-2
C	Joint Letter re: Stay of Subpoena	28
D	Plaintiff's Letter to Judge Marrero	34
E	U.S. Statement of Interest	32

Exhibit A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DONALD J. TRUMP,

Plaintiff,

- against -

CYRUS R. VANCE, JR., in his official capacity as District Attorney of the County of New York, and MAZARS USA, LLP,

Defendants.

19 Civ. 8694 (VM)

DECISION AND ORDER

VICTOR MARRERO, United States District Judge.

Plaintiff Donald J. Trump ("Plaintiff" or the "President"), filed this action seeking to enjoin enforcement of a grand jury subpoena (the "Mazars Subpoena") issued by Cyrus R. Vance, Jr., in his official capacity as the District Attorney of the County of New York (the "District Attorney"), to the accounting firm Mazars USA, LLP ("Mazars"). (See "Complaint," Dkt. No. 1; "Amended Complaint," Dkt. No. 27.)[1]

[1] The Court notes a measure of ambiguity regarding whether the President purports to bring this suit in his official capacity as President. The President never explicitly states that he does so, yet his arguments depend on his status as the sitting President. Whether privately retained, non-government attorneys accountable only to the President as an individual are entitled to invoke an immunity allegedly derived from the office of the Presidency, raises questions not addressed here. In any event, the Court finds resolution of this ambiguity unnecessary to its analysis.

INTRODUCTION

The President asserts an extraordinary claim in the dispute now before this Court. He contends that, in his view of the President's duties and functions and the allocation of governmental powers between the executive and the judicial branches under the United States Constitution, the person who serves as President, while in office, enjoys absolute immunity from criminal process of any kind. Consider the reach of the President's argument. As the Court reads it, presidential immunity would stretch to cover every phase of criminal proceedings, including investigations, grand jury proceedings and subpoenas, indictment, prosecution, arrest, trial, conviction, and incarceration. That constitutional protection presumably would encompass any conduct, at any time, in any forum, whether federal or state, and whether the President acted alone or in concert with other individuals.

Hence, according to this categorical doctrine as presented in this proceeding, the constitutional dimensions of the presidential shield from judicial process are virtually limitless: Until the President leaves office by expiration of his term, resignation, or removal through impeachment and conviction, his exemption from criminal proceedings would extend not only to matters arising from performance of the President's duties and functions in his

official capacity, but also to ones arising from his private affairs, financial transactions, and all other conduct undertaken by him as an ordinary citizen, both during and before his tenure in office.

Moreover, on this theory, the President's special dispensation from the criminal law's purview and judicial inquiry would embrace not only the behavior and activities of the President himself, but also extend derivatively so as to potentially immunize the misconduct of any other person, business affiliate, associate, or relative who may have collaborated with the President in committing purportedly unlawful acts and whose offenses ordinarily would warrant criminal investigation and prosecution of all involved.

In practice, the implications and actual effects of the President's categorical rule could be far-reaching. In some circumstances, by raising his protective shield, applicable statutes of limitations could run, barring further investigation and prosecution of serious criminal offenses, thus potentially enabling both the President and any accomplices to escape being brought to justice. Temporally, such immunity would operate to frustrate the administration of justice by insulating from criminal law scrutiny and judicial review, whether by federal or state courts, not only matters occurring during the President's tenure in office,

but potentially also records relating to transactions and illegal actions the President and others may have committed before he assumed the Presidency.

This Court cannot endorse such a categorical and limitless assertion of presidential immunity from judicial process as being countenanced by the nation's constitutional plan, especially in the light of the fundamental concerns over excessive arrogation of power that animated the Constitution's delicate structure and its calibrated balance of authority among the three branches of the national government, as well as between the federal and state authorities. Hence, the expansive notion of constitutional immunity invoked here to shield the President from judicial process would constitute an overreach of executive power.

The Court recognizes that subjecting the President to some aspects of criminal proceedings could impermissibly interfere with or even incapacitate the President's ability to discharge constitutional functions. Certainly lengthy imprisonment upon conviction would produce that result. But, as elaborated below, and contrary to the President's immunity claim as asserted here, that consequence would not necessarily follow every stage of every criminal proceeding. In particular that concern would not apply to the specific set of facts presented here to which the Court's holding is

limited: the President's compliance with a grand jury subpoena issued in the course of a state prosecutor's criminal investigation of conduct and transactions relating to third persons that occurred at least in part prior to the President assuming office, that may or may not have involved the President, but that at this phase of the proceedings demand review of records the President possesses or controls.

Alternatives exist that would recognize such distinctions and reconcile varying effects associated with a claim of presidential immunity in different criminal proceedings and at different stages of the process. The Court rejects the President's theory because, as articulated, such sweeping doctrine finds no support in the Constitution's text or history, or in germane guidance charted by rulings of the United States Supreme Court.

Questions and controversy over the scope of presidential immunity from judicial process, and unqualified invocations of such an exemption as advanced by some Presidents, are not new in the nation's constitutional experience. In fact, disputes concerning the doctrine arose during the Constitutional Convention in 1787 and the Framers' deliberations gave it some consideration. The underlying issues, however, were not explicitly articulated in the text of the charter that emerged from the Convention and thus have

remained largely unresolved. Consequently, the only thing truly absolute about presidential immunity from criminal process is the Constitution's silence about the existence and contours of such an exemption, a void the President seeks to fill by the expansive theory he proffers.

Nonetheless, the Founders and courts and legal commentators have repeatedly expressed one overarching concern about the breadth of the President's immunity from judicial process, a fear that served as a vital principle for subsequent court and scholarly review of the question: whether while in office the President stands above the law and absolutely beyond the reach of judicial process in any criminal proceeding. Shunning the concept of the inviolability of the person of the King of England and the bounds of the monarch's protective screen covering the Crown's actions from legal scrutiny, the Founders disclaimed any notion that the Constitution generally conferred similarly all-encompassing immunity upon the President. They gave expression to that rejection by recognizing the duality the President embodied as a unique figure, serving as head of the nation's government, but also existing as a private citizen.[2] As detailed below, the wisdom of that view has been

[2] See Memorandum from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, Re: Amenability of the President, Vice President and Other Civil Officers to Federal Criminal Prosecution While in Office

tested before the courts on various occasions and has been roundly and consistently reaffirmed by the Supreme Court and lower courts.

In numerous rulings, the courts have circumscribed claims of presidential immunity in multiple ways. Specifically, they have held that such protection from judicial process does not extend to civil suits regarding private conduct that occurred before the President assumed office, to responding to subpoenas regarding the conduct of third-persons, and to providing testimony in court proceedings relating to private disputes involving third persons.

The notion of federal supremacy and presidential immunity from judicial process that the President here invokes, unqualified and boundless in its reach as described above, cuts across the grain of these constitutional precedents. It also ignores the analytic framework that the Supreme Court has counseled should guide review of presidential claims of immunity from judicial process. Of equal fundamental concern, the President's claim would tread

---

at 20 n.14 (Sept. 24, 1973) ("The Framers of the Constitutions made it abundantly clear that the President was intended to be a Chief Executive, responsible, subject to the law, and lacking the prerogatives and privileges of the King of England . . . and that the President would not be above the law, nor have a single privilege annexed to his character.") (citing sources).

upon principles of federalism and comity that form essential components of our constitutional structure and the federal/state balance of governmental powers and functions. Bared to its core, the proposition the President advances reduces to the very notion that the Founders rejected at the inception of the Republic, and that the Supreme Court has since unequivocally repudiated: that a constitutional domain exists in this country in which not only the President, but, derivatively, relatives and persons and business entities associated with him in potentially unlawful private activities, are in fact above the law.

Because this Court finds aspects of such a doctrine repugnant to the nation's governmental structure and constitutional values, and for the reasons further stated below, it ABSTAINS from adjudicating this dispute and DISMISSES the President's suit. In the alternative, in the event on appeal abstention were found unwarranted under the circumstances presented here, the Court DENIES the President's motion for injunctive relief.

I. BACKGROUND

The Court begins by briefly recounting some facts that appear to be uncontested. The District Attorney is investigating conduct that occurred in New York State. As part of that investigation, the District Attorney served a

grand jury subpoena on the Trump Organization, LLC (the "Trump Organization") on August 1, 2019. That subpoena seeks various documents and records of the Trump Organization covering the period from June 2015 through September 2018. The Trump Organization proceeded to respond, at least in part, to that subpoena without court involvement. On August 29, 2019, the District Attorney served the Mazars Subpoena on Mazars. The Mazars Subpoena seeks various documents and records, including tax returns of the President and possibly third persons, covering the period from January 2011 through the present. In mid-September, counsel for the President informed the District Attorney that the President would seek to prevent enforcement of and compliance with the Mazars Subpoena as it related to the production of tax records. The President has now done so through this action.

On September 19, 2019, the President filed the Complaint in this action. On the same day, the President filed an emergency motion for a temporary restraining order and a preliminary injunction. (See "Pl.'s Motion," Dkt. No. 6; "Pl.'s Mem.," Dkt. No. 10-1[3]; "Consovoy Decl.," Dkt. No. 6-2.) Upon receipt of the President's motion and supporting

[3] Citations to the memorandum of law in support of the President's motion for injunctive relief herein shall be citations to Dkt. No. 10-1. The Court notes, however, that the memorandum of law at that docket entry is an amended version of the memorandum of law originally filed with the Court at Dkt. No. 6-3. (See Dkt. No. 10.)

documents, the Court directed the parties to confer on a briefing schedule and hearing date. Consistent with the Court's request, the parties submitted a joint letter with a proposed briefing schedule and hearing date, which the Court endorsed. (See Dkt. No. 4.) At the same time, the District Attorney agreed to stay enforcement of and compliance with the Mazars Subpoena until Wednesday, September 25, 2019 at 1:00 p.m. (See id.)

On September 23, 2019, the District Attorney filed a memorandum of law in opposition to the President's motion for injunctive relief and in favor of the District Attorney's motion to dismiss the Complaint. (See "September 23 Letter," Dkt. No. 15; "Def.'s Mem.," Dkt. No. 16; "Shinerock Decl.," Dkt. No. 17.)

On September 24, 2019, the President filed an opposition to the District Attorney's motion to dismiss and a reply in further support of the President's motion for injunctive relief. (See "Pl.'s Reply," Dkt. No. 22.)

On the same day, the United States filed a statement in support of the entry of a temporary restraining order. (See Dkt. No. 24.) Specifically, the United States supported the granting of a temporary restraining order in order to afford the United States additional time to consider whether to participate in this action. (See id.)

Also on the same day, the Court received a letter from Mazars, which indicated that Mazars "takes no position on the legal issues raised by Plaintiff." (See Dkt. No. 26.)

The Court heard oral arguments from the President and the District Attorney on September 25, 2019. (See Dkt. Minute Entry dated 9/25/2019; Transcript ("Tr.").) At the conclusion of oral argument, the Court extended the stay of enforcement of and compliance with the Mazars Subpoena to September 26, 2019 at 5:00 p.m.; ordered the parties to meet and confer regarding their concerns, and to inform the Court by September 26, 2019 at 4:00 p.m. whether they had agreed upon a process for proceeding; and granted the request of the United States for additional time to consider whether to participate in the action. (See Dkt. No. 25.)

By letter dated September 26, 2019, the District Attorney informed the Court that the parties had agreed that the District Attorney would forbear from enforcement of the Mazars Subpoena until 1:00 p.m. two business days after the Court's ruling (or until 1:00 p.m. on Monday, October 7, 2019, whichever is sooner) and Mazars would gather and prepare responsive documents in the interim. (See Dkt. No. 28.)

By letter dated September 30, 2019, the United States indicated its intent to file a submission. (See Dkt. No. 30.) On October 2, 2019, the United States filed a Statement of

Interest, urging the Court not to abstain, but to exercise jurisdiction over this dispute and, following additional briefing, to reach the merits of the President's claimed immunity. (See "Statement of Interest," Dkt. No. 32.) By letter dated October 3, 2019, the District Attorney responded to the Statement of Interest. (See "Def.'s Response," Dkt. No. 33.)

II. DISCUSSION

A. ANTI-INJUNCTION ACT

The Court begins its analysis by considering the District Attorney's argument that the Anti-Injunction Act, 28 U.S.C. Section 2283 (the "AIA"), forecloses the injunctive relief the President seeks. (See Def.'s Mem. 5-6, 8-9.) Dating to the 18th century and designed "to forestall the inevitable friction between the state and federal courts that ensues from the injunction of state judicial proceedings by a federal court," Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 630 (1977), the AIA provides that a "court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. The President has amended his complaint to clarify that he brings suit under 42 U.S.C. Section 1983 ("Section 1983") (see Amended

Complaint ¶ 8), meaning this case fits squarely into the first of the AIA's three exceptions.[4] See Mitchum v. Foster, 407 U.S. 225, 243 (1972) ("[Section] 1983 is an Act of Congress that falls within the 'expressly authorized' exception of [the AIA]."). Because Mitchum allows the Court to conclude that the AIA is no bar to injunctive relief here, the Court finds it unnecessary to reach the President's alternative arguments for the inapplicability of the AIA.

B. ABSTENTION

The District Attorney also submits that, under the abstention doctrine set forth in Younger v. Harris, 401 U.S. 37 (1971), the Court must decline to exercise jurisdiction over the President's suit. (See Def.'s Mem. at 5-9.) Younger abstention is grounded in

> the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This . . . is referred to by many as "Our Federalism" . . . . What the concept . . . represent[s] is a system in which there is sensitivity to the legitimate interests of both State

[4] The District Attorney argues that the President's claimed immunity is "too vague and amorphous" to be cognizable under Section 1983. (Def.'s Response at 2 (quoting Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 106 (1989)).) The Court shares the District Attorney's doubts on this score. However, because the Court declines to exercise jurisdiction on other grounds, it will assume without deciding that the claim is properly brought under Section 1983. See Spargo v. New York State Comm'n on Judicial Conduct, 351 F.3d 65, 74 (2d Cir. 2003) (noting that federal courts may "choose among threshold grounds for disposing of a case without reaching the merits" (internal quotation marks omitted)).

> and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

401 U.S. at 44. Hence notwithstanding federal courts' "virtually unflagging obligation . . . to exercise the jurisdiction given them," Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800, 817 (1976), Younger requires federal courts to decline jurisdiction when a plaintiff seeks to enjoin one of the following three kinds of state proceedings: (1) "ongoing state criminal prosecutions," (2) "certain civil enforcement proceedings," and (3) "civil proceedings involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions." Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 78 (2013) (quoting New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350, 368 (1989) (internal quotation marks omitted)).

If the federal plaintiff seeks to enjoin one of these three types of proceedings, a federal court may consider three additional conditions that further counsel in favor of Younger abstention, first laid out in Middlesex County Ethics Commission v. Garden State Bar Association. See 457 U.S. 423, 432 (1982). The "Middlesex conditions" are "(1) [whether] there is a pending state proceeding, (2) that implicates an

important state interest, and (3) the state proceeding affords the federal plaintiff an adequate opportunity for judicial review of his or her federal constitutional claims." Falco v. Justices of the Matrimonial Parts of Supreme Ct. of Suffolk Cty., 805 F.3d 425, 427 (2d Cir. 2015).[5] Moreover, Younger also provides for an exception, pursuant to which a federal court may entertain a suit from which it must otherwise abstain, upon a showing of "bad faith, harassment, or any other unusual circumstance that would call for equitable relief" in federal court. 401 U.S. at 54.

For the reasons set forth below, the Court concludes that it must abstain under Younger.

1. Ongoing State Criminal Prosecution

Although the District Attorney views the Mazars Subpoena as part of an ongoing state criminal prosecution (see Def.'s Mem. at 6-7), the President disputes that contention. (See Pl.'s Reply at 10-11.) Hence the President denies the existence of either an "ongoing state criminal prosecution" under Sprint or a "pending state proceeding" per the first Middlesex condition. No party argues that there is a distinction between an "ongoing" proceeding and a "pending"

[5] Federal courts previously treated the Middlesex conditions as dispositive of the abstention inquiry, but it is unclear how much weight they should be given after the Sprint Court's clarification that they are merely "additional factors" appropriately considered in an abstention inquiry. See Falco, 805 F.3d at 427.

one, and the Court finds no such distinction in the law. The Court consequently considers these two terms identical for the purpose of its abstention analysis and concludes that the Mazars Subpoena does qualify as part of an ongoing state criminal prosecution for Younger purposes -- though not necessarily a prosecution of the President himself.

In the spirit of comity, the Court begins its analysis by observing that New York law considers the issuance of a grand jury subpoena to be a criminal proceeding. C.P.L. Section 1.20(18) defines a "[c]riminal proceeding" to cover "any proceeding which . . . occurs in a criminal court and is related to a prospective, pending or completed criminal action, . . . or involves a criminal investigation." C.P.L. Section 10.10(1) explains that the "'criminal courts' of [New York] state are comprised of the superior courts and the local criminal courts." Finally, C.P.L. Section 190.05 defines a grand jury as "a body . . . impaneled by a superior court and constituting a part of such court." Because the Mazars Subpoena relates to a criminal investigation and was issued by the grand jury, which constitutes a part of a criminal court, the Court finds as a matter of New York law that the Mazars Subpoena constitutes a criminal proceeding.

State law aside, the President correctly notes that the United States Courts of Appeals are divided on whether the

issuance of a grand jury or investigative subpoena constitutes a pending state proceeding for Younger purposes. Compare Monaghan v. Deakins, 798 F.2d 632, 637 (3d Cir. 1986)(holding that grand jury subpoenas do not constitute a pending state proceeding), vacated in part, 484 U.S. 193 (1988), with Craig v. Barney, 678 F.2d 1200, 1202 (4th Cir. 1982) (abstaining because of "Virginia's interest in the unfettered operation of its grand jury system"), Kaylor v. Fields, 661 F.2d 1177, 1182 (8th Cir. 1981), and Kingston v. Utah County, 161 F.3d 17, *4 (10th Cir. 1998) (Table). The United States Court of Appeals for the Second Circuit appears not to have yet ruled on the question.

The President asks the Court to agree with the Monaghan Court and hold that no ongoing criminal prosecution exists here because a state grand jury does not "adjudicate anything" and "exists only to charge that the defendant has violated the criminal law." (Pl.'s Reply at 11 (internal quotation marks omitted).) He also cites Google, Inc. v. Hood for the proposition that "Sprint undermined prior cases applying Younger abstention to grand-jury subpoenas." (Id. (citing 822 F.3d 212, 224 & n.7 (5th Cir. 2016)).)

However, the Sprint Court did not address what makes a criminal proceeding an ongoing prosecution. Instead, it reaffirmed that Younger applies only to criminal prosecutions

and state civil proceedings that are "akin to a criminal prosecution," and not to other civil proceedings. Sprint, 571 U.S. at 80. Here, there is no doubt that grand jury proceedings are criminal in nature. Moreover, the Hood Court explicitly observed that abstention was merited where Texas law reflected that a grand jury was "an arm of the court by which it is appointed." 822 F.3d at 223. As noted above, New York law similarly considers grand juries a part of the criminal court that impanels them. See also People v. Thompson, 8 N.E.3d 803, 810 (N.Y. 2014) ("[G]rand jurors are empowered to carry out numerous vital functions independently of the prosecutor, for they 'ha[ve] long been heralded as the shield of innocence . . . and as the guard of the liberties of the people against the encroachments of unfounded accusations from any source.'") (quoting People v. Sayavong, 635 N.E.2d 1213, 1215 (N.Y. 1994) (internal quotation marks omitted)). The Second Circuit has further confirmed that "Grand Juries exist by virtue of the New York State Constitution and the Superior Court that impanels them; they are not arms or instruments of the District Attorney." United States v. Reed, 756 F.3d 184, 188 (2d Cir. 2014).

Although the Second Circuit has not explicitly addressed whether grand jury proceedings constitute an ongoing state prosecution under Younger, judges of this district have

"routinely applied Younger where investigatory subpoenas have been issued," even prior to a "full-fledged state prosecution" and outside of the criminal context. Mir v. Shah, No. 11 Civ. 5211, 2012 WL 6097770, at *3 (S.D.N.Y. Dec. 4, 2012); aff'd, 569 F. App'x 48, 50-51 (2d Cir. 2014) (affirming on basis that "abstention is still appropriate here under the Sprint framework"); see also Mirka United, Inc. v. Cuomo, No. 06 Civ. 14292, 2007 WL 4225487, at *4 (S.D.N.Y. Nov. 27, 2007) ("Numerous courts have held that investigatory proceedings that occur pre-indictment and that are an integral part of a state criminal prosecution may constitute 'ongoing state proceedings' for Younger purposes."); J. & W. Seligman & Co. Inc. v. Spitzer, No. 05 Civ. 7781, 2007 WL 2822208, at *5 (S.D.N.Y. Sept. 27, 2007) ("[T]he issuance of compulsory process, including subpoenas, in criminal cases, initiates an 'ongoing' proceeding for the purposes of Younger abstention."); Nick v. Abrams, 717 F. Supp. 1053, 1056 (S.D.N.Y. 1989) ("[C]ommon sense dictates that a criminal investigation is an integral part of a criminal proceeding. . . . Permitting the targets of state criminal investigations to challenge subpoenas . . . in federal court prior to their indictment or arrest, therefore, would do . . . much damage to principles of equity, comity, and federalism . . . ."). The Court declines to contradict over thirty years'

worth of settled and well-reasoned precedent of courts in this district and instead concludes that this case involves an ongoing state criminal prosecution.

2. The Second Middlesex Condition

The second Middlesex condition favors abstention if the pending state proceeding implicates an important state interest. See Falco, 805 F.3d at 427. The Court finds this condition satisfied. A state's interest in enforcement of its criminal laws undoubtedly qualifies as an important state interest, particularly considering that Younger itself concerned a challenge to state criminal proceedings. See Arizona v. Manypenny, 451 U.S. 232, 243 (1981); see generally Younger, 401 U.S. 37.

3. The Third Middlesex Condition

The third Middlesex condition favors abstention if "the state proceeding affords the federal plaintiff an adequate opportunity for judicial review of his or her federal constitutional claims." Falco, 805 F.3d at 427 (internal quotation marks omitted). "[A]ny uncertainties as to the scope of state proceedings or the availability of state remedies are generally resolved in favor of abstention. . . . [I]t is the plaintiff's burden to demonstrate that state remedies are inadequate." Spargo, 351 F.3d at 78. In this respect, federal courts may not "assume that state judges

will interpret ambiguities in state procedural law to bar presentation of federal claims." Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 15 (1987).

The President argues that state proceedings are inadequate because "under current New York law, it does not appear that the President could move to quash a subpoena he did not receive." (Pl.'s Reply at 9.) However, the Court's review of New York law suggests otherwise. A non-recipient can challenge a subpoena under certain circumstances. See Beach v. Oil Transfer Corp., 199 N.Y.S.2d 74, 76 (Sup. Ct. Kings Cty. 1960) ("In situations where witnesses served with subpoenas are not parties, nevertheless, upon a claim of privilege, the defendant being the party principally concerned by the adverse effect of the subpoenas served upon the witnesses and being the party whose rights are invaded by such process may apply to the court whose duty it is to enforce it, to set aside such process if it is invalid." (internal quotation marks omitted)); see also In re Roden, 106 N.Y.S.2d 345, 347-48 (Sup. Ct. N.Y. Cty. 1951) ("Any party affected by the process of the court or its mandate may apply to the court for its modification, vacatur, quashal or other relief he feels he is entitled to receive."); accord Colfin Bulls Funding B, LLC v. Ampton Invs., Inc., No. 151885/2015, 2018 WL 7051063, at *8 (Sup. Ct. N.Y. Cty. Nov. 26, 2018)

(quoting In re Roden for same proposition); People v. Grosunor, 439 N.Y.S.2d 243, 246 (Crim. Ct. Bronx Cty. 1981) (same).

The preceding decisions indicate that the President can challenge the Mazars Subpoena in a state forum on the basis of his asserted immunity. At the very least, they reflect an ambiguity in state law that the Court must resolve in favor of abstention.[6]

The President raises a closer question by arguing that, even if available, a state forum would "not be truly adequate" given that the federal and state governments are already in conflict. (Pl.'s Reply at 9.) As the President notes, some sources suggest that Younger is inapplicable to suits the federal government chooses to bring against state governments in federal court, on the theory that in those situations the federal-state conflict Younger seeks to preempt will occur even if the federal court abstains. See United States v. Morros, 268 F.3d 695, 707 (9th Cir. 2001); United States v.

[6] Even if the President could not challenge the Mazars Subpoena in state proceedings, it is unclear why he could not raise his constitutional arguments in a challenge to the subpoena served upon the Trump Organization (the "Trump Organization Subpoena"). As the President's counsel noted at oral argument, "there's not a document Mazars has that [the Trump Organization does not] have in [its] possession," Tr. 47:22-23. Counsel further stated that the Mazars Subpoena was prompted by the Trump Organization's refusal to comply with the Trump Organization Subpoena. Tr. 47:24-48:3. If the President views both subpoenas as attempts to criminally prosecute him, he could litigate his claimed immunity in a challenge to the Trump Organization Subpoena and incidentally render compliance with the Mazars Subpoena a moot point.

Composite State Bd. of Med. Examiners, 656 F.2d 131, 135-36 (5th Cir. 1981). The United States echoes these arguments, contending that the "principles of comity and federalism . . . lose their force when the federal government's own Chief Executive invokes federal constitutional law to challenge a state grand jury subpoena demanding his records." (Statement of Interest at 4.)

As an initial note, as pointed out above, the Court is not certain that attorneys privately retained by the person who is President can bring suit on behalf of the United States. Indeed, the Justice Department has filed a Statement of Interest on behalf of the United States pursuant to 28 U.S.C. Section 517, rather than formally intervening as a party, or explicitly stating that it is appearing on behalf of the President in connection with official presidential business implicating United States interests.

Even assuming that this action is brought by the federal government, however, the Supreme Court appears not to have addressed the impact of this consideration on Younger analysis, and there is precedent to the contrary. See Colorado River, 424 U.S. at 816 n.23 (declining to consider "when, if at all, abstention would be appropriate where the Federal Government seeks to invoke federal jurisdiction"); United States v. Ohio, 614 F.2d 101, 104 (6th Cir. 1979) ("Abstention

from exercise of federal jurisdiction is not improper simply because the United States is the party seeking a federal forum."); United States v. Oregon, No. 10 Civ. 528, 2011 WL 11426, at *5 (D. Or. Jan. 4, 2011) ("[T]he United States' role as plaintiff is not dispositive to this question. Comity principles can justify abstention even when the United States is the plaintiff."), aff'd, 503 F. App'x 525, 527 (9th Cir. 2013) (affirming abstention on basis that the distinction between the federal government and a private citizen "is not material given the [Supreme Court's] comity rationale" in Levin v. Commerce Energy, Inc., 560 U.S. 413 (2010)).

The Court cannot agree that the President's filing of this action renders the principles of comity and federalism a nullity. While the Second Circuit does not appear to have directly addressed this "difficult question with regard to federal-state relations" in the Younger context, it has denied "that a stay [should be] automatically granted simply on the application of the United States." United States v. Certified Indus., Inc., 361 F.2d 857, 859 (2d Cir. 1966); see also United States v. Augspurger, 452 F. Supp. 659, 668 (W.D.N.Y. 1978) ("[T]he general rules of comity do apply even when the United States is the plaintiff.").

Instead, it is "necessary to inquire 'whether the granting of an injunction [is] proper in the circumstances of

this case.'" Certified Indus., 361 F.2d at 859 (quoting Leiter Minerals, Inc. v. United States, 352 U.S. 220, 226 (1957)). This circumstantial test better accords with the vision of a federal court system "in which there is sensitivity to the legitimate interests of both State and National Governments . . . anxious though [the Court] may be to vindicate and protect federal rights and federal interests." Younger, 401 U.S. at 44. Automatically deferring to federal interests in suits brought by the federal government is as incompatible with our federalism as unthinkingly deferring to states' interests in state proceedings.[7]

Further, the President provides no compelling proof that New York courts would fail to adequately adjudicate his immunity claim, relying instead on the unsubstantiated allegation that he would risk "local prejudice." (Pl.'s Reply at 9 (quoting Clinton v. Jones, 520 U.S. 681, 691 (1997)).) Absent a much more compelling showing, the Court declines to conclude that New York courts will treat the President with

[7] The Court does not believe that the cases cited by the President compel a contrary conclusion. The Composite State Court specifically distinguished its set of facts from a case where, as here, "the state and federal governments are not in direct conflict" even though the federal government might have "an interest in the outcome of the action to the extent that a federal right is implicated." 656 F.2d at 136. And the Morros Court found that the federal-state conflict inhered where the two governments were locked in a contentious dispute spanning over ten years. See 268 F.3d at 708. By contrast, a direct or inherent conflict is not inevitable in this case, where the state grand jury has merely requested records pertaining to a broad set of facts and actors and may not ultimately target the President.

prejudice. Similarly, the United States misses the mark when it argues that "the state's interest in litigating such an unusual dispute in a state forum is minimal." (Statement of Interest at 8.) To the contrary, "[u]nder our federal system, it goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government. Because the regulation of crime is pre-eminently a matter for the States, we have identified a strong judicial policy against federal interference with state criminal proceedings." Manypenny, 451 U.S. at 243 (internal alterations, citations, and quotations omitted). The President's interest in adjudicating an alleged immunity from state criminal process in federal court, with respect to a state investigation that may or may not ultimately target the President, cannot outweigh the State interest without much stronger proof of State judicial inadequacy.[8]

[8] The United States also argues against abstention by analogizing to 28 U.S.C. Section 1442, which authorizes a federal officer to remove a state court action to federal court if she is directly sued "for or relating to any act under color of" her office. (Statement of Interest at 9.) But Mazars's duties and services with respect to the President's personal financial records do not appear to relate to any act taken under the color of the President's office, and no party argues otherwise. Nor has any party pointed to a federal defense that Mazars could bring, as might otherwise justify removal under the statute. See Watson v. Philip Morris Cos., 551 U.S. 142, 151 (2007); Isaacson v. Dow Chem. Co., 517 F.3d 129, 139 (2d Cir. 2008). Far from being directed to a federal officer for her federal acts, the Mazars Subpoena requests private records from a private third party. The Court declines to upend its broader Younger analysis on the basis of an inapposite hypothetical.

Even if the law regarding suits brought by the federal government is ultimately unclear, the Court cannot disregard the principles underlying Younger on this basis alone. And in any event, "it remains unclear how much weight [the Court] should afford [the Middlesex conditions] after Sprint." Falco, 805 F.3d at 427. Because the Court finds that there is an ongoing state criminal prosecution, an important state interest is implicated, and the state proceeding would afford the President at least a procedurally adequate opportunity for judicial review of his federal claims, the weight of the Court's analysis under Sprint and the Middlesex conditions requires abstention.[9]

4. The Bad Faith or Harassment Exception

Although the Court finds that a state criminal prosecution is ongoing and the Middlesex conditions further discourage the Court's exercise of jurisdiction, abstention may still be inappropriate if the President can demonstrate "bad faith, harassment, or any other unusual circumstance

[9] The Court is sensitive to the President's argument that abstention under these circumstances might embolden state-level investigation of future Presidents, especially by elected prosecutors in jurisdictions strongly opposed to a given incumbent. However, the Court cannot conclude that this argument merits the exercise of jurisdiction here, where the District Attorney has subpoenaed a third party in a broad investigation that may not ultimately target the President. If future criminal investigations by state prosecutors more clearly target a President on politicized grounds or invade on the prerogatives of the Presidency, then either such exceptional circumstances or evidence that the investigations lacked a good-faith basis could potentially warrant the exercise of federal court jurisdiction to consider such a challenge.

that would call for equitable relief." Younger, 401 U.S. at 54. "However, a plaintiff who seeks to head off Younger abstention bears the burden of establishing that one of the exceptions applies." Diamond "D" Constr. Corp. v. McGowan, 282 F.3d 191, 198 (2d Cir. 2002). To invoke the bad faith exception, "the party bringing the state action must have no reasonable expectation of obtaining a favorable outcome." Id. at 199 (internal quotation marks omitted). "[R]ecent cases concerning the bad faith exception have further emphasized that the subjective motivation of the state authority in bringing the proceeding is critical to, if not determinative of, this inquiry." Id.

The President argues that the Mazars Subpoena was issued in bad faith because it essentially copies two congressional subpoenas which cover subject matter allegedly exceeding the District Attorney's jurisdiction. The President also cites numerous statements by federal and state officials indicating their intent to investigate the President's finances and remove him from office. (See Amended Complaint ¶¶ 25–41.) The President further relies on Black Jack Distributors, Inc. v. Beame to claim that this evidence raises an inference that the District Attorney's "activities have a secondary motive" and are "going beyond good faith enforcement of the [criminal]

laws." (Pl.'s Reply at 10 (quoting 433 F. Supp. 1297, 1304-07 (S.D.N.Y. 1977)).)

The District Attorney acknowledges that the Mazars Subpoena is substantially identical to the congressional subpoenas, but he argues that the Mazars Subpoena remains appropriate because it would encompass documents relevant to the state's investigation and enable Mazars to produce those documents promptly, as Mazars had already begun collecting the same documents in order to respond to the congressional subpoenas. (Tr. 30:16-25.) The District Attorney adds that although the documents covered by the subpoenas may relate to matters of federal law, they nevertheless "certainly pertain to potential issues under state law," which would be the "exclusive focus" of his investigation. (Tr. 30:1-5.)

And although the statements cited in the President's complaint certainly reflect that a number of New York State elected officials may wish the President's tenure in office to end, those statements do not reveal the "subjective motive" of the District Attorney in initiating these particular proceedings -- particularly when the District Attorney made none of these statements himself, and they cannot otherwise be attributed to him. To hold otherwise and impute bad faith to the District Attorney on the basis of statements made by various legislators and the New York Attorney General would

be "incompatible with federal expression of 'a decent respect' for" the state authority's functions. Glatzer v. Barone, 614 F. Supp. 2d 450, 460 (S.D.N.Y. 2009).

This case is thus distinguishable from Black Jack Distributors, where the court's finding of bad faith relied on a police department's consistent and repeated use of arrest procedures that had been "long ago held invalid under New York law," pursuant to the head of the enforcement project's declaration that the department would "undertake activities knowing that they are illegal" and "despite all constitutional limitations . . . stop at nothing" to put the plaintiff out of business. 433 F. Supp. at 1306. The President has not shown that the District Attorney is acting with anywhere near the same level of disregard for the law at this point in the investigation.

Moreover, the President has not alleged that the District Attorney lacks any "reasonable expectation of obtaining a favorable outcome," Diamond "D" Constr. Corp., 282 F.3d at 199, in the criminal prosecution of which the Mazars Subpoena is part -- a proceeding which, after all, need not necessarily lead to an indictment of the President himself. Indeed, the Declaration of Solomon Shinerock reflects that the District Attorney's investigation relates at least in part to "'hush money' payments to Stephanie

Clifford and Karen McDougal, how those payments were reflected in the Trump Organization's books and records, and who was involved in determining how those payments would be reflected in the Trump Organization's books and records." (See Shinerock Decl. ¶ 9.)

The Declaration also reflects that a variety of investigations related to similar conduct are either ongoing or resolved, including a non-prosecution agreement between federal prosecutors and American Media, Inc. related to an investigation of the lawfulness of the "hush money" payments; the conviction of Michael D. Cohen for tax fraud, false statements, and campaign finance violations during the period he was counsel to the President; and investigations by multiple other New York regulatory authorities concerning alleged insurance and bank fraud by the Trump Organization and its officers. (See id. ¶ 17.) None of these investigations necessarily involve the President himself, and the President fails to show that the District Attorney could not reasonably expect to obtain a favorable outcome in a criminal investigation that is substantially related to the topics and targets listed above. Barring a stronger showing from the President, the Court declines to impute bad faith to the District Attorney in relation to these proceedings.

5. The Extraordinary Circumstances Exception

Even if bad faith and harassment do not apply, a district court that would otherwise abstain under Younger may hear the federal plaintiff's claims if the claimant can prove that extraordinary or unusual circumstances justify enjoining the state court proceeding. See Younger, 401 U.S. at 54. "[S]uch circumstances must be 'extraordinary' in the sense of creating an extraordinarily pressing need for immediate federal equitable relief, not merely in the sense of presenting a highly unusual factual situation." Kugler v. Helfant, 421 U.S. 117, 124-25 (1975). The Second Circuit has construed Kugler and related Supreme Court precedent to require "(1) that there be no state remedy available to meaningfully, timely, and adequately remedy the alleged constitutional violation; and (2) that a finding be made that the litigant will suffer 'great and immediate' harm if the federal court does not intervene" for the exception to apply. Diamond "D" Const. Corp., 282 F.3d at 201.

As noted in Section II.B.3 supra, New York state courts appear to provide an at least procedurally adequate avenue for remedying the alleged constitutional violation at issue. While the Court is mindful of "the special solicitude due to claims alleging a threatened breach of essential Presidential prerogatives," Nixon v. Fitzgerald, 457 U.S. 731, 743 (1982),

the President's claims nevertheless fail to demonstrate an "extraordinarily pressing need for immediate federal equitable relief." Kugler, 421 U.S. at 125. As described further in Section II.C.3.i infra, the President fails to show irreparable harm. The double jeopardy cases that the President cites are likewise inapposite to support his proposition that a claim of Presidential immunity would be "irreparably lost if . . . not vindicated immediately." (Pl.'s Reply at 8.) The President has not been the subject of any of the criminal proceedings he lists as grounds showing irreparable harm; he has not been indicted, arrested, or imprisoned, or even been identified as a target of the District Attorney's investigation -- let alone been tried once before, as required in the double jeopardy context.

Though the President and the United States devote significant attention to the President's unique constitutional position, these arguments reflect the highly unusual factual underpinning of this case rather than the "extraordinarily pressing need for immediate federal equitable relief" demanded by Kugler. Far from requesting immediate relief, the United States asks that this Court schedule additional briefing on the merits of the President's

claims.[10] (See Statement of Interest at 10.) The President's claim that his absolute immunity defense must be "vindicated immediately" also runs counter to his counsel's representations at oral argument that the President is not currently "seeking a permanent resolution of this dispute" but is instead merely asking for "an orderly process that allows the serious constitutional questions to be adjudicated carefully and thoughtfully[,] that preserves the [P]resident's right to be heard and allows him a reasonable chance to appeal any adverse decision that might alter the status quo." (Tr. 11:4, 10-14.)

The President fails to show that New York courts would not afford him such an orderly process, and his claim to absolute immunity simply does not demonstrate "an extraordinarily pressing need for immediate federal equitable relief" where the District Attorney has not identified the President as a target of the state investigation, let alone actually indicted him. On the contrary, the President's prophecies that he will be indicted and denied due process in state proceedings are, at best, speculative and unripe. The Second Circuit has previously held that "[t]he exceptional

[10] The Court denies this request, as the Court fails to see how further briefing on the merits of the President's immunity arguments would add to the parties' already extensive treatment of the subject, including a lengthy oral argument.

circumstances exception does not apply [where] the likelihood of immediate harm is speculative." See Miller v. Sutton, 697 F. App'x 27, 28 (2d Cir. 2017). This Court now so holds.

For these reasons, the Court abstains from exercising jurisdiction over the President's suit.

C. PRESIDENTIAL IMMUNITY

Notwithstanding the Court's decision to abstain, and mindful of the complexities and uncharted ground that the Younger doctrine presents, the Court will proceed to examine the merits of the President's claimed immunity and articulate an alternative holding, so as to obviate a remand in the event on appeal the Second Circuit disagrees with the Court's abstention holding. For the reasons stated below, the Court would deny the motion of the President for a temporary restraining order and a preliminary injunction (collectively, "injunctive relief").

At the outset, the Court notes that the question it addresses in this Order is narrower than the one upon which the President urges the Court to focus. Based on the record before it, and as noted in the preceding section of the Court's decision, the Court finds no clear and convincing evidence that the President himself is the target -- or, at minimum, the sole target -- of the investigation by the District Attorney. Rather, the record before the Court

indicates that the District Attorney is investigating a set of facts, and a number of individuals and business entities, in relation to which conduct by the President, lawful or unlawful, may or may not be a part. Accordingly, the question before the Court narrows to whether the District Attorney may issue a grand jury subpoena to a third person or entity requiring production of personal and business records of the President and other persons and entities? The Court's answer to that question is yes.

1. Legal Standard

Temporary restraining orders and preliminary injunctions are among "the most drastic tools in the arsenal of judicial remedies." Grand River Enter. Six Nations, Ltd. v. Pryor, 481 F.3d 60, 66 (2d Cir. 2007) (per curiam). To obtain this extraordinary remedy,

> [a] party seeking a preliminary injunction must ordinarily establish (1) irreparable harm; (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits of its claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in favor of the moving party; and (3) that a preliminary injunction is in the public interest.

New York ex rel. Schneiderman v. Actavis PLC, 787 F.3d 638, 650 (2d Cir. 2015) (internal quotation marks omitted). Because it is well-recognized that the legal standards governing preliminary injunctions and temporary restraining

orders are the same, the Court addresses them together. See AFA Dispensing Grp. B.V. v. Anheuser-Busch, Inc., 740 F. Supp. 2d 465, 471 (S.D.N.Y. 2010).

On the second element, the President advocates for the standard requiring "sufficiently serious questions going to the merits." (Pl.'s Reply at 17-18.) The Court finds, however, that the proper test here is the "likelihood of success" standard. The grand jury issued its subpoena in the course of an investigation into violations of New York law; the President's motion is thus an attempt to "stay government action taken in the public interest pursuant to a statutory . . . scheme." Able v. United States, 44 F.3d 128, 131 (2d Cir. 1995). It is of no consequence that the proposed injunction would not restrain the State's financial laws themselves: "As long as the action to be enjoined is taken pursuant to a statutory or regulatory scheme, even government action with respect to one litigant requires application of the 'likelihood of success' standard." Id.; see also Plaza Health Labs., Inc. v. Perales, 878 F.2d 577, 580-81 (2d Cir. 1989). Nevertheless, given the Court's holding on the other prongs of the preliminary injunction standard, the President would not prevail even under the different but no less stringent "sufficiently serious questions" analysis.

Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 35 (2d Cir. 2010).

2. Parties' Arguments

The President advances two fundamental reasons for why he is entitled to injunctive relief. First, he argues that he will suffer an irreparable harm in the absence of injunctive relief, because "there will be no way to unring the bell once Mazars complies with the District Attorney's subpoena." (Pl.'s Mem. at 3.) Second, the President argues that he has demonstrated a likelihood of success on the merits, because, according to the President, it is clear that "[n]o State can criminally investigate, prosecute, or indict a President while he is in office." (Id.)

The District Attorney counters that the President's motion for injunctive relief should be denied, because the President has failed to carry his burden of showing entitlement to the requested relief. The District Attorney primarily maintains that the President has failed to demonstrate that he will suffer irreparable harm in the absence of injunctive relief for three reasons. First, the District Attorney contends that compliance with the Mazars Subpoena could be "undone" if the Court were to find the Mazars Subpoena to be invalid and unenforceable. (Def.'s Mem. at 12-13.) Second, the District Attorney notes that both his

office and the grand jury are obligated to maintain confidential any documents produced in response to the Mazars Subpoena. (See id. at 13.) Third, the District Attorney argues that no irreparable harm will ensue "if it becomes public that there is an ongoing criminal investigation that includes requests from third-parties about business transactions that relate to the President," in part because other entities have already been investigating conduct related to the President and those investigations have been public. (Id. at 13–14.)

The District Attorney also argues that the President has failed to demonstrate a likelihood of success on the merits. According to the District Attorney, there exists no law supporting a presidential immunity as expansive as the one claimed by the President in this action. (See id. at 15.) Finally, the District Attorney argues that the balance of equities and public interest both weigh in favor of denying the requested injunctive relief, because there is a public interest in having the grand jury investigation at issue proceed expeditiously. (See id. at 19.)

3. Analysis

The Court is not persuaded that the immunity claimed by the President in this action is so expansive as to encompass enforcement of and compliance with the Mazars Subpoena. As such, the President has not satisfied his burden of showing

entitlement to the "extraordinary and drastic remedy" of injunctive relief. Grand River Enter., 481 F.3d at 66. The Court turns to each element of the preliminary injunction standard in turn.

i. Irreparable Harm

The first element is irreparable harm, which is "an injury that is not remote or speculative but actual and imminent, and 'for which a monetary award cannot be adequate compensation.'" Dexter 345 Inc. v. Cuomo, 663 F.3d 59, 63 (2d Cir. 2011) (quoting Tom Doherty Assocs. v. Saban Entm't, Inc., 60 F.3d 27, 37 (2d Cir. 1995)). This high standard reflects courts' "traditional reluctance to issue mandatory injunctions." North Am. Soccer League, LLC v. United States Soccer Fed'n, Inc., 883 F.3d 32, 38 n.8 (2d Cir. 2018) (quoting Jacobson & Co., Inc. v. Armstrong Cork Co., 548 F.2d 438, 441 n.3 (2d Cir. 1977)).

The Court finds that enforcement of and compliance with the Mazars Subpoena would not cause irreparable harm to the President. The President urges the Court to find otherwise on the basis that public disclosure of his personal records would cause irreparable harm, first, to the confidentiality of the President's tax and financial records and, second, to the President's opportunity for judicial review of his claims in this action.

The Court is not persuaded that disclosure of the President's financial records to the office of the District Attorney and the grand jury would cause the President irreparable harm. The President relies on a number of cases to support his argument that mere disclosure -- without more -- of the documents requested by the Mazars Subpoena would cause irreparable harm, but none of those cases relate to ongoing criminal investigations, let alone to the disclosure of documents and records to a grand jury bound by law and sworn official oath to keep such documents and records confidential. See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bishop, 839 F. Supp. 68 (D. Me. 1993) (disclosure of plaintiff's business records to competitor by a former employee); Providence Journal Co. v. Fed. Bureau of Investigation, 595 F.2d 889 (1st Cir. 1979) (disclosure of FBI documents to plaintiff); PepsiCo, Inc. v. Redmond, No. 94 Civ. 6838, 1996 WL 3965 (N.D. Ill. Jan. 2, 1996) (disclosure of plaintiff's trade secrets or confidential information to competitor defendant); Metro. Life Ins. Co. v. Usery, 426 F. Supp. 150 (D.D.C. 1976) (disclosure -- to a chapter of the National Organization for Women -- of certain forms and plans submitted by insurance companies to federal offices); Airbnb, Inc. v. City of New York, No. 18 Civ. 7712, 2019 WL 91990

(S.D.N.Y. Jan. 3, 2019) (disclosure of data regarding businesses' customers to Mayor's Office).

The Court agrees with the District Attorney that the grand jury is a "constitutional fixture." United States v. Williams, 504 U.S. 36, 47 (1992). As such, the Court finds that disclosure to a grand jury is different from disclosure to other persons or entities like those identified in the cases cited by the President. And because a grand jury is under a legal obligation to keep the confidentiality of its records, the Court finds that no irreparable harm will ensue from disclosure to it of the President's records sought here. See, e.g., People v. Fetcho, 698 N.E.2d 935, 938 (N.Y. 1998) ("[S]ecrecy has been an integral feature of Grand Jury proceedings since well before the founding of our Nation. . . . The reasons for this venerable and important policy include preserving the reputations of those being investigated by and appearing before a Grand Jury, safeguarding the independence of the Grand Jury, preventing the flight of the accused and encouraging free disclosure of information by witnesses.") (internal citation and quotation marks omitted); People v. Bonelli, 945 N.Y.S.2d 539, 541 (N.Y. Sup. Ct. 2012) ("Grand Jury secrecy is of paramount public interest and courts may not disclose these materials lightly." (internal quotation marks omitted)).

Further, as explained in Section II.B.3 supra, the Court finds that a state forum exists for judicial review of the President's claim.

ii. Likelihood of Success on the Merits

Even if the President had made a sufficient showing that enforcement of the Mazars Subpoena and the President's compliance with it would cause the President irreparable harm -- and, to be clear, the Court finds it would not -- the Court would nonetheless deny the President's motion for injunctive relief because the President has failed to demonstrate a likelihood of success on the merits.

The Court disagrees with the President's position that a third person or entity cannot be subpoenaed requesting documents related to an investigation concerning potentially unlawful transactions and conduct of third parties in which records possessed or controlled by the sitting President may be critical to establish the guilt or innocence of such third parties, or of the President. The Court also rejects the President's contention that the Constitution, the historical record, and the relevant case law support such a presidential claim.

As a threshold matter, the Court underscores several vital points. First, the President recognizes that the precise constitutional question this action presents -- the

core boundaries of the President's immunity from criminal process -- has not been presented squarely in any judicial forum, and thus has never been definitively resolved. (See Amended Complaint ¶ 10 ("no court has had to squarely consider the question" of whether a President can be subject to criminal process while in office).)

The President urges the Court to conclude that the powers vested in the President by Article II and the Supremacy Clause necessarily imply that the President cannot "be investigated, indicted, or otherwise subjected to criminal process" while in office (Pl.'s Mem. at 9), and that "criminal process" encompasses investigations of third persons concerning matters that may relate to conduct or transactions of third persons, or of the President. (Id. at 8, 13.) As the Court reads the proposition, the President's definition of "criminal process" is all-encompassing; it would extend a blanket presidential and derivative immunity to all stages of federal and state criminal law enforcement proceedings and judicial process: investigations, grand jury proceedings, indictment, arrest, prosecution, trial, conviction, and punishment by incarceration and perhaps even by fine. The Court will proceed to canvas the various relevant authorities to assess that proposition.

a. Department of Justice Memoranda

As authority for the absolute immunity doctrine he proclaims, the President points to and rests substantially upon two documents issued by the Justice Department's Office of Legal Counsel ("OLC"). The first memorandum appeared in 2000. See Memorandum Opinion for the Attorney General, from Randolph D. Moss, Assistant Attorney General, Office of Legal Counsel, A Sitting President's Amenability to Indictment and Criminal Prosecution (Oct. 16, 2000) (the "Moss Memo"). The Moss Memo in turn contains a review and reaffirmation of an OLC memorandum from 1973. See Memorandum from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, Re: Amenability of the President, Vice President and Other Civil Officers to Federal Criminal Prosecution While in Office (Sept. 24, 1973) (the "Dixon Memo"). In addition, the President relies upon a 1973 brief filed by Solicitor General Robert Bork in the United States District Court for the District of Maryland in connection with a federal grand jury proceeding regarding misconduct of Vice President Spiro Agnew.[11] See Memorandum for the United States Concerning the

[11] The Moss Memo reexamined and updated the Dixon and Bork Memos and essentially reaffirmed their conclusion that indictment and prosecution of a President while in office would be unconstitutional because "it would impermissibly interfere with the President's ability to carry out his constitutionally assigned functions and thus would be inconsistent with the constitutional structure." See Moss Memo at 223.

Vice President's Claim of Constitutional Immunity (filed Oct. 5, 1973), In re Proceedings of the Grand Jury Impaneled December 5, 1972: Application of Spiro T. Agnew, Vice President of the United States, No. 73 Civ. 965 (D. Md. 1973) (the "Bork Memo"). The Dixon, Moss, and Bork Memos are here referred to collectively as the "DOJ Memos." The gist of these documents is that a sitting President is categorically immune from criminal investigation, indictment, and prosecution.

The Court is not persuaded that it should accord the weight and legal force the President ascribes to the DOJ Memos, or accept as controlling the far-reaching proposition for which they are cited in the context of the controversy at hand. As a point of departure, the Court notes that many statements of the principle that "a sitting President cannot be indicted or criminally prosecuted" typically cite to the DOJ Memos as sole authority for that proposition. Accordingly, the theory has gained a certain degree of axiomatic acceptance, and the DOJ Memos which propagate it have assumed substantial legal force as if their conclusion were inscribed on constitutional tablets so-etched by the Supreme Court. The Court considers such popular currency for the categorical concept and its legal support as not warranted.

Because the arguments the President advances are so substantially grounded on the supposed constitutional doctrine and rationale the DOJ Memos present, a close review of the DOJ Memos is called for. On such assessment, the Court rejects the DOJ Memos' position. It concludes that better-calibrated alternatives to absolute presidential immunity exist yielding a more appropriate balance between, on the one hand, the burdens that subjecting the President to criminal proceedings would impose on his ability to perform constitutional duties, and, on the other, the need to promote the courts' legitimate interests and functions in ensuring effective law enforcement attendant to the proper and fair administration of justice.

The heavy reliance the President places on the DOJ Memos is misplaced for several reasons. First, though they contain an exhaustive and learned consideration of the constitutional questions presented here, the DOJ Memos do not constitute authoritative judicial interpretation of the Constitution concerning those issues. In fact, as the DOJ Memos themselves also concede, the precise presidential immunity questions this litigation raises have never been squarely presented or fully addressed by the Supreme Court. See Moss Memo at 237; Dixon Memo at 21. Nonetheless, as elaborated in Section II.C.3.ii.c infra, insofar as the Supreme Court has examined

some of the relevant presidential privileges and immunities issues as applied in other contexts, the case law does not support the President's and the DOJ Memos' absolute immunity argument to its full extremity and ramifications.

Second, the DOJ Memos address solely the amenability of the President to federal criminal process. Hence, because state law enforcement proceedings were not directly at issue in the matters that prompted the memos, as they are here, the DOJ Memos do not address the unique concerns implicated by a blanket assertion of presidential immunity from state criminal law enforcement and judicial proceedings.[12] That gap and its significant distinction would include due recognition of the principles of federalism and comity, and the proper balance between the legitimate interests of federal and state authorities in the administration of justice, as discussed above in the section addressing Younger abstention. See Clinton v. Jones, 520 U.S. 681, 691 (1997) (noting that in the context of state law enforcement proceedings, invocation of presidential privilege could implicate "federalism and comity concerns").

[12] The Moss Memo acknowledged that its analysis, and that of the Dixon Memo, focused solely on federal rather than state prosecution of a President while in office, and therefore did not consider "any additional concerns that may be implicated by state criminal prosecution of a sitting President." Moss Memo at 223 n.2.

State criminal law enforcement proceedings and judicial process, moreover, do not implicate one of the DOJ Memos' rationales justifying broad presidential immunity from federal criminal process: that by virtue of the President's functions as Chief Executive, giving him power over prosecution, invocation of privilege, and pardons in federal criminal proceedings against the President would be inappropriate and ineffective, as such process would turn the President into prosecutor and defendant at the same time.[13] See Dixon Memo at 26.

Third, the Memos' analyses are flawed by ambiguities (if not outright conflicts) on an essential point: the scope of presidential immunity as presented in the DOJ Memos and asserted here by the President's claim. For instance, the Dixon Memo refers to the immunity of a sitting President from "criminal proceedings," without explicitly defining what "proceedings" the rule would encompass. See, e.g., Dixon Memo at 18. The Bork Memo, again without further elaboration, discusses the President's immunity from federal "criminal process" while in office. See Bork Memo at 3. Whether there

[13] Of course, as the Watergate scandal and more recent events confirm, there are practical and legal constraints over a president's power to interfere with a federal law enforcement investigation of himself or his Office, without risking serious charges of obstruction of justice.

is a difference between "criminal proceedings" and "criminal process" is a basic open question.

The Moss Memo, rather than addressing this uncertainty, compounds it by introducing a third expression of the principle that, though not further defined, clearly suggests a narrower scope of presidential immunity than that expressed in the Dixon and Bork Memos. In particular, throughout, the Moss Memo's analysis refers to the exemption as not subjecting a President while in office to "indictment and criminal prosecution." See, e.g., Moss Memo at 222. That articulation invites inquiry as to whether the rule it states would not apply to pre-indictment stages of criminal process such as investigations and grand jury proceedings, including responding to subpoenas.

On this crucial point the DOJ Memos may be at odds with one another. The specific circumstance that impelled the Dixon and Bork Memos was a grand jury investigation of Vice President Agnew, in which he objected to responding to a grand jury subpoena and argued that the Constitution prohibited investigation and indictment of an incumbent Vice President, and consequently that he could not be compelled to answer a subpoena. The Dixon and Bork Memos rejected that contention and concluded that the Vice President was not entitled to claim immunity from criminal process and prosecution. But

both Memos went further and indicated that such a broad exemption would extend to the sitting President. Implicitly, therefore, as suggested by the context, the Dixon and Bork Memos would expand the scope of their reference to "criminal proceedings" and "criminal process" to cover presidential immunity from all pre-indictment phases of criminal law prosecutions, presumably including exemption from investigations, grand jury proceedings, and subpoenas.

The Moss Memo, however, by framing its analysis of the scope of the President's immunity from criminal law enforcement by reference specifically to "indictment or criminal prosecution," could be read to suggest that the exemption would not encompass investigations and grand jury proceedings, including responding to subpoenas. In fact, the Moss Memo expressly distinguishes the other two memos on this point.[14] Addressing concern over the potential prejudicial loss of evidence that could occur during a period of presidential immunity prior to indictment, the Moss Memo states that "[a] grand jury could continue to gather evidence throughout the period of immunity, even passing this task down to subsequently empaneled grand juries if necessary." Moss Memo at 257 n.36. Moreover, the Moss Memo disavows an

[14] See Moss Memo at 232 n.10 (noting that unlike the Dixon Memo, the Bork Memo "did not specifically distinguish between indictment and other phases of the 'criminal process'").

interpretation of the Dixon and Bork Memos' analyses as positing "a broad contention that the President is immune from all judicial process while in office." Moss Memo at 239 n.15. It further notes that the Dixon Memo "specifically cast doubt upon such a contention" and explains that a broader statement by Attorney General Stanbury in 1867 "is presumably limited to the power of the courts to review official action of the President." Id. (emphasis added).

The Moss Memo thus stepped back from the extreme position advanced by Vice President Agnew, and that is repeated here by the President's argument, that immunity extends to all criminal investigations and grand jury proceedings, including responding to subpoenas. In fact, as the Moss Memo acknowledges, such a view has been rejected by longstanding case law. Supporting this observation, the Moss Memo quotes another OLC Memorandum, dating to 1988, which declared that "it has been the rule since the Presidency of Thomas Jefferson that a judicial subpoena in a criminal case may be issued to the President, and any challenge to the subpoena must be based on the nature of the information sought rather than any immunity from process belonging to the President." Id. at 253 n.29 (quoting Memorandum for Arthur B. Culvahouse, Jr., Counsel to the President, from Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel, Re: Constitutional

Concerns Implicated by Demand for Presidential Evidence in a Criminal Prosecution at 2 (Oct. 17, 1988)); see also United States v. Burr, 25 Fed. Cas. 30, No. 14,692 (C.C.D. Va. 1807) (Chief Justice Marshall noting that "[t]he guard, furnished to [the President] to protect him from being harassed by vexatious and unnecessary subpoenas, is to be looked for in the conduct of a court after those subpoenas have issued; not in any circumstances which is to [] precede their being issued"); Clinton, 520 U.S. at 704-05 ("It is also settled that the President is subject to judicial process in appropriate circumstances. . . . We unequivocally and emphatically endorsed [Chief Justice] Marshall's position when we held that President Nixon was obligated to comply with a subpoena commanding him to produce certain tape recordings of his conversations with his aides. . . . As we explained, 'neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute unqualified Presidential privilege of immunity from judicial process under all circumstances.'" (quoting United States v. Nixon, 418 U.S. 683, 706 (1974) (internal citations omitted)); Memorandum from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, Re: Presidential Amenability to Judicial Subpoena (June 25, 1973) (noting the

view expressed by Chief Justice Marshall in Burr that while the President's duties may create difficulties complying with a subpoena, this "was a matter to be shown upon the return of the subpoena as a justification for not obeying the process; it did not constitute a reason for not issuing it").

The uncertainties and inconsistencies these various statements manifest about an essential question of constitutional interpretation suggest that the DOJ Memos' position concerning presidential immunity from criminal law enforcement and judicial process cannot serve as compelling authority for the President's claim of absolute immunity, at least insofar as the argument would extend to pre-indictment investigations and grand jury proceedings such as those at issue in this case.

Finally, the DOJ Memos lose persuasive force because their analysis and conclusions derive not from a real case presenting real facts, but instead from an unqualified abstract doctrine conclusorily asserting a generalized principle, specifically the proposition that while in office the President is not subject to criminal process. Because the constitutional text and history on point are scant and inconclusive, the DOJ Memos construct a doctrinal foundation and structure to support a presidential immunity theory that substantially relies on suppositions, practicalities, and

public policy, as well as on conjurings of remote prospects and hyperbolic horrors about the consequences to the Presidency and the nation as a whole that would befall under any model of presidential immunity other than the categorical rule on which the DOJ Memos and the President's claim ultimately rest.

The shortcomings of formulating a categorical rule from abstract principles may be highlighted by various concrete examples demonstrating that other plausible alternatives exist that would not produce the dire consequences the DOJ Memos portray absent the absolute presidential exemption they propound. The indictment stage of criminal process presents such an illustration, raising fundamental questions, reasonable doubts, and feasible grounds for making exceptions to an unqualified presidential immunity doctrine. The Dixon Memo itself acknowledges as "arguable" the possibility of an alternative approach that would not implicate the concerns about the burdens and interferences with the President's ability to carry out official duties that are advanced to justify a categorical immunity rule: Permit the indictment of a sitting President but defer further prosecution until he or she leaves office. See Dixon Memo at 31. The Dixon Memo concludes that "[f]rom the standpoint of minimizing direct interruption of official duties . . . this procedure might be

a course to be considered." Id. at 29. Nonetheless, the Dixon Memo rejects that alternative, declaring without further analysis or support that an indictment pending while the President remains in office would harm the Presidency virtually as much as an actual conviction. Id.

Perhaps the most substantial flaw in the DOJ Memos' case in favor of a categorical presidential immunity rule extending to all stages of criminal process is manifested in their expressions of absolutism that upon close parsing and deeper probing does not bear out. On this point, the DOJ Memos engage in rhetorical flair -- also embraced by the President's arguments -- that not only overstates their point, but does not consider the possibility of substantive distinctions which could reasonably address concerns about the burdens and intrusions that criminal proceedings against a sitting President could entail, and thus could support a practical alternative to a regime of absolute presidential immunity.

The thrust of the DOJ Memos' argument is that a doctrine of complete immunity of the President from criminal proceedings while in office can be justified by the consideration that subjecting the President to the jurisdiction of the courts would be unconstitutional because "it would impermissibly interfere with the President's ability to carry out his constitutionally assigned functions

and thus would be inconsistent with the constitutional structure." Moss Memo at 223.

In support of that peremptory claim, the DOJ Memos -- and the President -- describe various physical and non-physical interferences associated with defending criminal proceedings that they contend could impair the ability of a President to govern, even possibly amounting to a complete functional disabling of the President. In particular, the DOJ Memos cite mental distraction, the effect of public stigma, loss of stature and respect, the need to assist in the preparation of a defense, the time commitment demanded by personal appearance at a trial, and the incapacitation effected by an arrest or imprisonment if convicted. See, e.g., Moss Memo at 249-54. Summarizing these potential impediments, the Dixon Memo concludes:

> [T]he President is the symbolic head of the Nation. To wound him by a criminal proceeding is to hamstring the operation of the whole governmental apparatus, both in foreign and domestic affairs. . . . [T]he spectacle of an indicted President still trying to serve as Chief Executive boggles the imagination.

Dixon Memo at 30. To a similar effect, the Moss Memo declares that

> the ordinary workings of the criminal process would impose burdens upon a sitting President that would directly and substantially impede the executive branch from performing its constitutionally assigned functions, and the accusation or adjudication of the criminal culpability of the nation's chief executive by either a

> grand jury returning an indictment or a petit jury returning a verdict would have a dramatically destabilizing effect upon the ability of a coordinate branch of government to function.[15]

Moss Memo at 236.

A major problem with constructing a categorical rule founded upon hypothesizing and extrapolating from an abstract general proposition disembodied from an actual set of facts, is that the entire theoretical structure could collapse when it encounters a real-world application that shakes the underpinnings of the unqualified doctrine. To propound as a blanket constitutional principle that a President cannot be subjected to criminal process presupposes a faulty premise. Implicit in that pronouncement is the assumption that every crime -- and every stage of every criminal proceeding, at any time and forum, whether involving only one or many other offenders -- is just like every other instance of its kind.

The absolute proposition also presumes uniformity of consequences: that but for the application of absolute presidential immunity every one of these circumstances would give rise to every one of the alarming outcomes conjured by

---

[15] The Court notes that in this statement the Moss Memo essentially implies that the scope of presidential immunity it urges would extend to grand jury proceedings, not only to "indictment and criminal prosecution," as expressed throughout the rest of the memo. The remark apparently contradicts expressions elsewhere in the memo suggesting that a sitting President could be the subject of grand jury investigations. See, e.g., supra pages 50-51.

the DOJ Memos to justify unqualified presidential protection from any form of criminal process. But on deeper scrutiny of the rationale for the categorical doctrine, and by constructing alternatives that eliminate or substantially mitigate even the most extreme fears conjured, the assumptions underlying the categorical rule may prove both unjustified and wrong.

In fact, not every criminal proceeding to which a President may be subjected would raise the grim specters the DOJ Memos portray as incapacitation of the President, as impeding him from discharging official duties, or as hamstringing "the operation of the whole governmental apparatus." Dixon Memo at 30. To be sure, some crimes and some criminal proceedings may involve very serious offenses that undisputably may demand the President's full personal time, energy, and attention to prepare a defense, and that consequently could justify recognition of broader immunity from criminal process in the particular case.

Nonetheless, not every criminal offense falls into that exceptional category. Some crimes may require months or even years to resolve, while others conceivably could be disposed of in a matter of days, even hours. To be specific, perhaps a charge of murder and imprisonment upon conviction would present extraordinary circumstances raising the burdens and

interferences the DOJ Memos describe and thus justify broad immunity. But a charge of failing to pay state taxes, or of driving while intoxicated, may not necessarily implicate such concerns. Similarly, responding to a subpoena relating to the conduct of a third party, as is the case here, would likely not create the catastrophic intrusions on the President's personal time and energy, or impair his ability to discharge official functions, or threaten the "dramatic destabilization" of the nation's government that the DOJ Memos and the President depict. See Dixon Memo at 29 (acknowledging that "[t]he physical interference consideration . . . would not be quite as serious regarding minor offenses leading to a short trial and a fine," and that "Presidents have submitted to the jurisdiction of the courts in connection with traffic offenses"). See also, Moss Memo at 254 (acknowledging that "[i]t is conceivable that, in a particular set of circumstances, a particular criminal charge will not in fact require so much time and energy of a sitting President so as materially to impede the capacity of the executive branch to perform its constitutionally assigned functions.").

As regards public stigma, vilification, and loss of stature associated with criminal prosecutions, again some criminal offenses undoubtedly could engender such

consequences and would warrant significant weight in assessing a claim of immunity from criminal process, but others would not. Indeed, some civil wrongs, such as sexual harassment, could arouse much greater public opprobrium and cause more severe mental anguish and personal distraction than, for example, criminal possession of a marijuana joint. Moreover, as Paula Jones's lawsuit against President Clinton illustrated, civil charges of sexual misconduct filed against a sitting President could entail an extensive call on a President's time and energy, and potentially interfere with performance of official duties,[16] perhaps to a greater degree than some criminal charges that could be more readily resolved. And not every crime and not every conviction necessarily results in a sentence requiring imprisonment.

In a similar vein, a criminal accusation involving the President alone cannot be considered in the same light as one entailing unlawful actions committed by other persons that in some way may also implicate potential criminal conduct by the President. This circumstance presents unique implications that demand recognizing and making finer distinctions. A grand jury investigation of serious unlawful acts committed

[16] See Clinton, 520 U.S. at 701-02 ("As a factual matter, [President Clinton] contends that this particular case -- as well as the potential additional litigation that an affirmance . . . might spawn -- may impose an unacceptable burden on the President's time and energy and thereby impair the effective performance of his office.").

by third persons may turn up evidence incriminating the sitting President. It would create significant issues impairing the fair and effective administration of justice if the proceedings had to be suspended or abandoned because the President, invoking absolute immunity from all criminal investigations and grand jury proceedings, refused to provide critical evidence he may possess that could, either during the investigation or at later proceedings, convict or exonerate any of the co-conspirators. In that instance, the President's claim of absolute immunity conceivably could enable the guilty to go free, and deprive the innocent of an opportunity to resolve serious accusations in a court of law.

The running of a statute of limitations in favor of the President or third persons during the period of immunity presents additional complexities and exceptional circumstances in these situations, similarly raising the prospect of frustrating the proper administration of justice.

A hypothetical combining all of these difficulties may illustrate how a real and compelling set of facts could undermine a blanket invocation of presidential immunity from all criminal process. Suppose that during the course of a criminal investigation of numerous third persons engaged in very serious crimes, some of the targets being high-ranking government officials, substantial evidence is uncovered

indicating that the President was closely involved with those other persons in committing the offenses under investigation. The accusations come to light not long before the President's term is about to expire, leaving no time for the House of Representatives to present articles of impeachment, nor for the Senate to conduct a trial. But the applicable statute of limitations is also about to expire before the President leaves office.

On these facts, no persuasive argument could be made that an indictment of the President while in office, along with the co-conspirators -- thereby tolling the statute of limitations -- would present the severe burdens and interferences with the discharge of the President's duties that the DOJ Memos interpose. Balanced against the prospect of a number of powerful individuals going free and escaping punishment for serious crimes by virtue of the President asserting absolute immunity from criminal process, an alternative that would allow the indictment and prosecution to proceed under these circumstances may weigh against recognizing a categorical claim of presidential immunity.

The Dixon Memo acknowledges the special difficulties that criminal proceedings involving co-conspirators and statute of limitations problems present. See Dixon Memo at 29, 32, 41. In response, the Dixon Memo dismisses such

concerns as not sufficient to overcome the argument in favor of the President's absolute immunity. See id. On that point, the Dixon Memo remarks: "In this difficult area all courses of action have costs and we recognize that a situation of the type just mentioned could cause a complete hiatus in criminal liability." Id. at 32. But failure to do full and fair justice in any case should not be shrugged off as mere collateral damage caused by a claim of presidential privilege or immunity. If in fact criminal justice falls to an assertion of immunity, that verdict should be an absolutely last resort. It should be justified by exacting reasons of momentous public interest such as national security, and be reviewable by a court of law. Above all, its effect should not be to shield the President from all legal process, especially in circumstances where it may appear that a claim of generalized immunity is invoked more on personal than on official grounds, and work to place the President above the law. See Nixon, 418 U.S. at 706 (holding that "[a]bsent a claim of need to protect military, diplomatic, or sensitive national security secrets," a generalized interest in protecting the confidentiality of presidential communications in the performance of the President's duties must yield to the adverse effects of such a privilege on the fair administration of justice). As the Nixon Court declared under pertinent

circumstances, "[t]he impediment that an absolute unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III." Id. at 707; see also Clinton, 520 U.S. at 708. Here, this Court is not persuaded that the President has met this rigorous standard.

b. Constitutional Text and History

The Court finds that the structure of the Constitution, the historical record, and the relevant case law support its conclusion that, except in circumstances involving military, diplomatic, or national security issues, a county prosecutor acts within his or her authority -- at the very least -- when issuing a subpoena to a third party even though that subpoena relates to purportedly unlawful conduct or transactions involving third parties that may also implicate the sitting President. No other conclusion squares with the fundamental notion, embodied in those sources, that the President is not above the law.

Turning first to the text of the Constitution and the historical record, the Court concludes that neither the Constitution nor the history surrounding the founding support as broad an interpretation of presidential immunity as the one now espoused by the President. As the Supreme Court did

in Clinton, this Court notes that the historical record does not conclusively answer the question presented to the Court:

> Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side . . . . They largely cancel each other.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634-35 (1952).

c. Supreme Court Guidance

Turning to the opinions issued by the Supreme Court, the Court finds that they support this Court's conclusions in this action. The Supreme Court has twice recognized that "[i]t is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States." Clinton, 520 U.S. at 705 (quoting Fitzgerald, 457 U.S. at 753-54). "[I]t is also settled that the President is subject to judicial process in appropriate circumstances." Id. at 703.

The narrower part of the judicial process that is at issue in this action -- i.e., responding to a subpoena -- has similarly been addressed by the Supreme Court. That Court squarely upheld the view first espoused by Chief Justice Marshall, who presided over the trial for treason of Vice

President Aaron Burr while in office, that "a subpoena duces tecum could be directed to the President." Id. at 703-04; accord Nixon, 418 U.S. at 706 ("[N]either the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances."); see also Nixon v. Sirica, 487 F.2d 700, 709-10 (D.C. Cir. 1973) ("The clear implication is that the President's special interests may warrant a careful judicial screening of subpoenas after the President interposes an objection, but that some subpoenas will nevertheless be properly sustained by judicial orders of compliance.") (en banc) (per curiam).

And at least one President (Richard M. Nixon) has himself conceded that he, as President, was required to produce documents in response to a judicial subpoena: "He concedes that he, like every other citizen, is under a legal duty to produce relevant, non-privileged evidence when called upon to do so." Sirica, 487 F.2d at 713. If a subpoena may be directed to the President, it follows that a subpoena potentially implicating private conduct, records, or transactions of third persons and the President may lawfully be directed to a third-party.

The Court cannot square a vision of presidential immunity that would place the President above the law with the text of the Constitution, the historical record, the relevant case law, or even the DOJ Memos on which the President relies most heavily for support. The Court thus finds that the President has not demonstrated a likelihood of success on the merits and is accordingly not entitled to injunctive relief in this action. Contrary to the President's claims, the Court's conclusion today does not "upend our constitutional design." (Pl.'s Reply at 4.) Rather, the Court's decision upholds it.

d. Alternatives

The questions and concerns the DOJ Memos present, and that the President here embraces, need not inexorably lead to only one course, that of prescribing an absolute immunity rule. In fact, the Supreme Court has provided guidance to govern invocations of absolute immunity. In Clinton it declared that such claims should be resolved by a "functional" approach. Specifically, the Court counseled that "an official's absolute immunity should extend only to acts in performance of particular functions of his office." Clinton, 520 U.S. at 694. The court further explained that "immunities are grounded in 'the nature of the function to be performed, not the identity of the actor who performed it.'" Id. at 695

(quoting Forrester v. White, 484 U.S. 219, 229-30 (1988)). Underscoring this point, the Court concluded that "we have never suggested that the President, or any other official, has an immunity that extends beyond the scope of any action taken in an official capacity." Clinton, 520 U.S. at 694.

The DOJ Memos, while espousing a categorical presidential immunity rule, and perhaps seeming inconsistent on this point as well,[17] also recognize the applicability of such a method. The Dixon Memo, for instance, concludes that

> under our constitutional plan it cannot be said either that the courts have the same jurisdiction over the President as if he were an ordinary citizen or that the President is absolutely immune from the jurisdiction of the courts in regard to any kind of claim. The proper approach is to find the proper balance between the normal functions of the courts and the special responsibilities and function of the Presidency.

Dixon Memo at 24.

In the few instances in which the Supreme Court has addressed questions concerning the scope of the President's assertion of executive privilege and immunity from judicial process, albeit in varying contexts, several general principles and a functional framework emerge from the Court's

[17] The Dixon Memo, for example, though remarking that an alternative of permitting an indictment of a President and deferring trial until he is out of office is a course worthy of consideration, rejects the option in favor of a categorical rule. The Dixon Memo also admits to "certain drawbacks" of an absolute immunity doctrine. Similarly, the memo acknowledges the difficulties that a categorical rule presents because of issues such as the running of the statute of limitations and the involvement of co-conspirators, but again discounts those concerns to support a categorical rule. See Dixon Memo at 17, 32.

pronouncements that should inform and guide adjudications of such claims. A synthesis of Burr, Nixon, Fitzgerald, and Clinton suggests that the Supreme Court would reject an interpretation and application of presidential powers and functions that would "sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances." Nixon, 418 U.S. at 706. Rather than enunciating such a categorical rule, the Supreme Court's guidance suggests that courts take account of various circumstances that may bear upon a court's ultimate determination concerning the appropriateness of a claim of presidential immunity from judicial process relating to a criminal proceeding.

Among the relevant considerations are: whether the events at issue involve conduct taken by the President in an a private or official capacity; whether the conduct at issue involved acts of the President, or of third parties, or both; whether the conduct of the President occurred while the President was in office, or before his tenure; whether the acts in dispute related to functions of the President's office; whether a subpoena for production of records was issued against the President directly or to a third person; whether the judicial process at issue involves federal or state judicial process; whether the proceedings pertain to a

civil or criminal offense; whether the enforcement of the particular criminal process concerned would impose burdens and interferences on the President's ability to execute his constitutional duties and assigned functions; and whether the effect of the President's asserting immunity under the circumstances would be to place the President, or other persons, above the law.

The analytic framework the Supreme Court counsels courts to employ requires a balancing of interests. The assessment would consider the interest of the President in protecting his office from undue burdens and interferences that could impair his ability to perform his official duties, and the interests of law enforcement officers and the judiciary in protecting and promoting the fair, full, and effective administration of justice.

The relevance of these multiple considerations in a determination of the appropriateness of presidential immunity from criminal process under such varying circumstances underscores the incompatibility of an unqualified, absolute doctrine, and, rather than a blanket application; points to a case-by-case approach in which a demonstration of

sufficiently compelling conditions to justify presidential exemption is made by the courts.[18]

Here, the Court's weighing of the competing interests persuades it to reject the President's request for injunctive relief. The interest the President asserts in maintaining the confidentiality of certain personal financial and tax records that largely relate to a time before he assumed office, and that may involve unlawful conduct by third persons and possibly the President, is far outweighed by the interests of state law enforcement officers and the federal courts in ensuring the full, fair, and effective administration of justice.

The Court is not persuaded that the burdens and interferences the President describes in this case would substantially impair the President's ability to perform his constitutional duties. See Clinton, 520 U.S. at 705 ("The burden on the President's time and energy that is a mere byproduct of [judicial] review surely cannot be considered as onerous as the direct burden imposed by judicial review and the occasional invalidation of his official actions."). In

[18] The Moss Memo mentions such a course in passing, reiterating its support for a categorical rule "rather than a doctrinal test that would require the court to assess whether a particular criminal proceeding is likely to impose serious burdens upon the President.") Moss Memo at 254. This point ignores that it was precisely this kind of assessment that the Supreme Court conducted in Nixon and Clinton, and that more generally courts routinely make in the course of performing their constitutional duties.

the Court's view, frustration of the state criminal investigation under the facts presented here presents much greater concerns that overcome the President's grounds for not complying with the grand jury subpoena.

iii. The Public Interest

Given that the Court finds that the President would not suffer irreparable harm or succeed on the merits, it is unnecessary to consider whether the public interest would favor a preliminary injunction. Nevertheless, the Court notes that the public interest does not favor granting a preliminary injunction. As discussed above, grand juries are an essential component of our legal system and the public has an interest in their unimpeded operation. Manypenny, 451 U.S. at 243; see also United States v. Dionisio, 410 U.S. 1, 17 (1973) (referring to "the public's interest in the fair and expeditious administration of the criminal laws"); Branzburg v. Hayes, 408 U.S. 665, 688-90 (1972) (in a First Amendment case, referring to "the public interest in law enforcement and in ensuring effective grand jury proceedings" and noting that the principle that the public is entitled to every person's evidence "is particularly applicable to grand jury proceedings"); In re Sealed Case, 794 F.2d 749, 751 n.3 (D.C. Cir. 1986) (per curiam) (referring to "the weighty public

interest in the orderly functioning of grand juries and the judicial process").

III. ORDER

For the reasons described above, it is hereby

ORDERED that the amended complaint of plaintiff Donald J. Trump (Dkt. No. 27) is **DISMISSED** pursuant to the decision of the United States Supreme Court in Younger v. Harris, 401 U.S. 37 (1971).

SO ORDERED.

Dated: New York, New York
7 October 2019

Victor Marrero
U.S.D.J.

Exhibit B

DISTRICT ATTORNEY
OF THE
COUNTY OF NEW YORK
ONE HOGAN PLACE
New York, N. Y. 10013
(212) 335-9000

CYRUS R. VANCE, JR.
DISTRICT ATTORNEY

August 29, 2019

VIA HAND DELIVERY
Mazars USA LLP
Attn: Custodian of Records
135 West 50th Street
New York, NY 10020

Re: Investigation Number 2018-00403803
Return Date: September 19, 2019

To Whom It May Concern:

Enclosed please find a subpoena seeking records relating to the above-referenced investigation. These records are needed on or before September 19, 2019.

In lieu of appearing personally with the requested data, you may email electronic copies to paralegal Daniel Kenny (kennyd@dany.nyc.gov) or deliver CDs, DVDs, or USB 2.0 external hard drives to the New York County District Attorney's Office, 80 Centre Street, Major Economic Crimes Bureau, New York, NY 10013, for the attention of Assistant District Attorney Solomon Shinerock, c/o Daniel Kenny. Please note that electronic copies are preferred.

If you have any problems or questions concerning the subpoena or the manner of delivery, please contact me at the number below. Your attention to this matter is greatly appreciated.

Respectfully yours,

Solomon Shinerock
Assistant District Attorney
(212) 335-9567

Enc.

SUBPOENA

(Duces Tecum)

FOR A WITNESS TO ATTEND THE

GRAND JURY

In the Name of the People of the State of New York

To: Custodian of Records
Mazars USA LLP

YOU ARE COMMANDED to appear before the **GRAND JURY** of the County of New York, at the Grand Jury Room 907, of the Criminal Courts Building at One Hogan Place, between Centre and Baxter streets, in the Borough of Manhattan of the City, County and State of New York, on **September 19, 2019** at **2:00 p.m.** of the same day, **as a witness in a criminal proceeding:**

Investigation into the Business and Affairs of John Doe (2018-00403803),

AND, YOU ARE DIRECTED TO BRING WITH YOU AND PRODUCE AT THE TIME AND PLACE AFORESAID, THE FOLLOWING ITEMS IN YOUR CUSTODY:

SEE EXHIBIT A – ATTACHED

IF YOU FAIL TO ATTEND AND PRODUCE SAID ITEMS, you may be adjudged guilty of a Criminal Contempt of Court, and liable to a fine of one thousand dollars and imprisonment for one year.

Dated in the County of New York,
August 29, 2019

CYRUS R. VANCE, JR.
District Attorney, New York County

By: Solomon Shinerock

Solomon Shinerock
Assistant District Attorney
(212) 335-9567

Note: In lieu of appearing personally with the requested documents, you may email electronic copies to paralegal Daniel Kenny (kennyd@dany.nyc.gov) or deliver CDs, DVDs, or USB 2.0 external hard drives to the New York County District Attorney's Office, 80 Centre Street, Major Economic Crimes Bureau, New York, NY 10013, for the attention of Assistant District Attorney Solomon Shinerock, c/o Daniel Kenny.

Inv. Number: 2018-00403803

EXHIBIT A TO SUBPOENA TO MAZARS USA LLP
DATED AUGUST 29, 2019

ITEMS TO BE PRODUCED are those in the actual and constructive possession of Mazars USA LLP, its related predecessors, entities, agents, officers, employees and officials over which it has control, including without limitation subsidiaries:

1. For the period of January 1, 2011 to the present, with respect to Donald J. Trump, the Donald J. Trump Revocable Trust, the Trump Organization Inc., the Trump Organization LLC, the Trump Corporation, DJT Holdings LLC, DJT Holdings Managing Member LLC, Trump Acquisition LLC, Trump Acquisition, Corp., the Trump Old Post Office LLC, the Trump Foundation, and any related parents, subsidiaries, affiliates, joint ventures, predecessors, or successors (collectively, the "Trump Entities"):

    a. Tax returns and related schedules, in draft, as-filed, and amended form;

    b. Any and all statements of financial condition, annual statements, periodic financial reports, and independent auditors' reports prepared, compiled, reviewed, or audited by Mazars USA LLP or its predecessor, WeiserMazars LLP;

    c. Regardless of time period, any and all engagement agreements or contracts related to the preparation, compilation, review, or auditing of the documents described in items (a) and (b);

    d. All underlying, supporting, or source documents and records used in the preparation, compilation, review, or auditing of documents described in items (a) and (b), and any summaries of such documents and records; and

    e. All work papers, memoranda, notes, and communications related to the preparation, compilation, review, or auditing of the documents described in items (a) and (b), including, but not limited to,

        i. All communications between Donald Bender and any employee or representative of the Trump Entities as defined above; and

        ii. All communications, whether internal or external, related to concerns about the completeness, accuracy, or authenticity of any records, documents, valuations, explanations, or other information provided by any employee or representative of the Trump Entities.

DEFINITIONS AND INSTRUCTIONS

As used herein, unless otherwise indicated, the following terms shall have the meanings set forth below:

A. The terms "relate," "reference," "concern," "reflect," "include," and "including without limitation," in whatever tense used, shall be construed as is necessary in each case to make the request to produce inclusive rather than exclusive, and are intended to convey, as appropriate in context, the concepts of comprising, respecting, referring to, embodying, evidencing, connected with, commenting on, concerning, responding to, showing, refuting, describing, analyzing, reflecting, presenting, and consisting of, constituting, mentioning, defining, involving, explaining, or pertaining to in any way, expressly or impliedly, to the matter called for.

B. The words "and," "or," "any" and "all" shall be construed as is necessary in each case to make each request to produce inclusive rather than exclusive.

C. Terms in the plural include the singular and terms in the singular include the plural. Terms in the male include the female and terms in the female include the male. Neutral gender terms include all.

D. "Document" includes without limitation, any written, printed, typed, photocopied, photographic, recorded or otherwise created or reproduced communication or representation, whether comprised of letters, words, numbers, pictures, sounds or symbols, or any combination thereof, in the form maintained, having access to, constructively possessed, physically possessed, and controlled. This definition includes copies or duplicates of documents contemporaneously or subsequently created that have any non-conforming notes or other markings, and drafts, preliminary versions, and revisions of such. It includes, without limitation, correspondence, memoranda, notes, records, letters, envelopes, telegrams, faxes, messages, emails, voice mails, instant messenger services, studies, analyses, contracts, agreements, working papers, summaries, work papers, calendars, diaries, reports. It includes, without limitation, internal and external communications of any type. It includes without limitation documents in physical, electronic, audio, digital, video existence, and all data compilations from which the data sought can be obtained, including electronic and computer as well as by means of other storage systems, in the form maintained and in usable form.

E . "Communication" includes every means of transmitting, receiving or recording transmission or receipt of facts, information, opinion, data, or thoughts by one person, and between one and more persons, entities, or things.

Exhibit C

DISTRICT ATTORNEY
COUNTY OF NEW YORK
ONE HOGAN PLACE
New York, N.Y. 10013
(212) 335-9000

CYRUS R. VANCE, JR.
DISTRICT ATTORNEY

CAREY R. DUNNE
GENERAL COUNSEL

BY HAND DELIVERY
Judge Victor Marrero
U.S. District Court Judge
Southern District of New York
500 Pearl Street, New York, N.Y.

September 26, 2019

Re: Donald J. Trump v. Cyrus R. Vance, Jr.
Case No. 1:19-cv-08694 (VM)

Dear Judge Marrero:

We represent the office of Cyrus R. Vance, Jr., District Attorney of New York County (the "Office"), a defendant in this matter.

Pursuant to the Court's order of September 25, 2019 (Dkt. # 25), and without prejudice to any right asserted by any party, we write to inform the Court that the parties have reached a temporary arrangement.

The Office agrees to forbear enforcement of Mazars USA LLP's ("Mazars") obligations to produce documents pursuant to the Mazars subpoena at issue in this litigation until 1:00 p.m. two business days after the Court rules on the pending motions to dismiss and for injunctive relief, or until 1:00 p.m. on Monday, October 7, 2019, whichever is sooner. In the interim, the parties agree that Mazars will resume gathering and preparing all documents responsive to the subpoena. The parties further agree that, subject to a contrary court order, Mazars will begin a rolling production of such documents immediately upon the expiration of this agreement, with Mazars' first production to be made by hand delivery at 4:00 p.m. on the day this agreement expires.

We are available at the Court's convenience should any questions arise concerning this undertaking.

Very truly yours,

Carey R. Dunne, *General Counsel*
Christopher Conroy
Solomon B. Shinerock
James H. Graham
Allen J. Vickey
Assistant District Attorneys
New York County District Attorney's Office

Agreed on September 26, 2019:

William Consovoy
Marc Mukasey
Alan Futerfas
Counsel of Record for the Plaintiff

Jerry D. Bernstein
Inbal Paz Garrity
Nicholas R. Tambone
Counsel of Record for Defendant Mazars USA, LLP

CC: all counsel of record (via email)

The Clerk of Court is directed to enter into the public record of this action the letter above submitted to the Court by the parties.

SO ORDERED.

9-26-19
DATE

VICTOR MARRERO, U.S.D.J.

Exhibit D

Consovoy McCarthy PLLC

1600 Wilson Boulevard, Suite 700
Arlington, VA 22209
703.243.9423
www.consovoymccarthy.com

October 4, 2019

BY HAND
Judge Victor Marrero
U.S. District Court Judge
Southern District of New York
500 Pearl Street, New York, NY

Re: ***Trump v. Vance*, No. 1:19-cv-8694**

Dear Judge Marrero:

As of this morning, this Court has not ruled on the President's pending motion, which invokes the President's constitutional immunity from state criminal subpoenas and requests an administrative stay, a temporary restraining order, a preliminary injunction, or a stay pending appeal. *See* Docs. 10-1, 22. At the same time, the District Attorney has refused to stay his subpoena to Mazars beyond "1:00 p.m. on Monday, October 7, 2019." Doc. 28 at 1. That deadline is now one business day away. If, by then, the President has not secured interim relief, his confidential financial documents will be delivered to the District Attorney and exposed to the grand jury.

The President recognizes that this Court is diligently working to decide his motion under immense time pressure. That time pressure, of course, is entirely artificial; the District Attorney created it by refusing to stay his subpoena until this Court and the Second Circuit can issue a decision—a basic professional courtesy that three separate committees of the U.S. House gave the President in similar cases. *See* Doc. 10-1 at 2. The Court can solve the problem the District Attorney has created by granting the President's (and the Justice Department's) request for interim relief and establishing an expedited briefing schedule on the motion for a preliminary injunction, the motion to dismiss, or both. That interim relief, moreover, can be an administrative stay, which would give the Court all the time it needs to consider these important issues without expressing a view on the merits. *See* 28 U.S.C. §1651(a); *Cobell v. Norton*, 2004 WL 603456, at *1 (D.C. Cir. Mar. 24, 2004).

In all events, the President needs a ruling (even in the form of a minute order) from this Court by **9:00 a.m. on Monday, October 7, 2019**. If the Court grants or denies the President's request for interim relief (or otherwise adjudicates the dispute between the parties) after Monday, then Mazars will have already disclosed his confidential information to the District Attorney and the grand jury. Even if the Court denies the President's request for interim relief on Monday, but after 9 a.m., the President will not have enough time to seek relief from the Second Circuit before Mazars discloses his confidential information. Either way, the President will suffer irreparable harm. *See Maness v. Meyers*, 419 U.S. 449, 460 (1975) ("Compliance could cause irreparable injury because appellate courts cannot always 'unring the bell' once the information has been released. Subsequent appellate vindication does not necessarily … totally repair[] the error."); *Becker v. United States*, 451 U.S. 1306, 1311 (1981) (Rehnquist, J., in chambers) ("Much of the harm applicants contend will result from turning their videotapes over to the IRS will not be remediable if a stay is denied here and applicants eventually prevail.").

Thus, if this Court has not yet acted on the President's request for interim relief (or otherwise adjudicated the dispute between the parties) by 9:00 a.m. on Monday, the President will have no choice

but to construe the Court's inaction as a denial and to appeal to the Second Circuit. *See Dist. of Columbia v. Trump*, 930 F.3d 209, 213 (4th Cir. 2019) (the President can immediately appeal the "effective denial" of absolute immunity); Wright & Miller, *Federal Practice & Procedure*, § 2962 ("When a court declines to make a formal ruling on a motion for a preliminary injunction, but its action has the effect of denying the requested relief, its refusal to issue a specific order will be treated as equivalent to the denial of a preliminary injunction and will be appealable."); *e.g.*, *Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1450 (9th Cir. 1992). In sum, inaction here—no less than an explicit rejection—will have the "practical effect" of denying the President's request for injunctive relief preserving the status quo. *Abbott v. Perez*, 138 S. Ct. 2305, 2319 (2018).

For these reasons, the President respectfully asks that the Court act on his request for interim relief by **9:00 a.m. on Monday, October 7, 2019**.

Sincerely,

William S. Consovoy
Counsel for Plaintiff President Donald J. Trump

cc: Solomon Shinerock
Jerry Bernstein
Joshua Gardner

With the filing of the letter above in the public docket of this action, the Court has closed the record of this proceeding. The parties are directed to refrain from making any further submissions. Any other papers filed will not be considered.
SO ORDERED.
DATE 10-4-19 VICTOR MARRERO, U.S.D.J.

Consovoy McCarthy PLLC

1600 Wilson Boulevard, Suite 700
Arlington, VA 22209
703.243.9423
www.consovoymccarthy.com

October 4, 2019

BY FAX
Judge Victor Marrero
U.S. District Court Judge
Southern District of New York
500 Pearl Street, New York, NY

Re: ***Trump v. Vance*, No. 1:19-cv-8694**

Dear Judge Marrero:

Attached is a copy of a letter that was hand delivered to the Court at 8:45 this morning. Because it addresses time-sensitive matters, I am faxing a copy as well. All counsel of record received a copy of the letter by email this morning.

Sincerely,

William S. Consovoy
Counsel for Plaintiff President Donald J. Trump

cc: Solomon Shinerock
Jerry Bernstein
Joshua Gardner

Exhibit E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

DONALD J. TRUMP, Plaintiff, v. CYRUS R. VANCE, JR., in his official capacity as District Attorney of the County of New York; SOLOMON SHINEROCK, in his official capacity as Assistant District Attorney of the County of New York; and MAZARS USA, LLP, Defendants.	)	No. 19-cv-8694-VM

STATEMENT OF INTEREST OF THE UNITED STATES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

UNITED STATES CONSTITUTION

OTHER AUTHORITIES

The United States of America respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517.[1] The President filed this action to enjoin enforcement of a local prosecutor's grand jury subpoena demanding the President's personal records, and as support for that relief he has invoked his "'unique position in the constitutional scheme,'" *Clinton v. Jones*, 520 U.S. 681, 698-99 (1997), and the "singular importance of [his] duties," *Nixon v. Fitzgerald*, 457 U.S. 731, 751 (1982). The President's complaint raises a number of significant constitutional issues that potentially implicate important interests of the United States. *See, e.g.*, Am. Compl. ¶¶ 10-24, ECF No. 21 (asserting that Article II, the Supremacy Clause, and the structure of the Constitution preclude subjecting a sitting President to state criminal process, including grand jury subpoenas directed at the President or his agents); *see generally A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222 (2000). Given the highly expedited nature of the current proceeding for a temporary restraining order, *see* ECF No. 25, the United States participates now to explain why it is both correct and important that the President's challenge to the subpoena on account of his office be resolved in federal court rather than in state court, and to support interim relief as necessary to allow for appropriate briefing of the weighty constitutional issues involved.[2]

Congress has provided both subject-matter jurisdiction and a cause of action that authorize

[1] That statute provides: "The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." 28 U.S.C. § 517.

[2] The United States has previously participated in cases that have presented other issues concerning the President's amenability to judicial process. *See, e.g.*, *Trump v. Deutsche Bank AG*, No. 19-1540 (2d Cir. Aug. 19, 2019) (whether a congressional subpoena seeking the President's personal financial records from a third-party custodian is enforceable); *Clinton v. Jones*, 520 U.S. 681 (1997) (whether civil litigation in federal court against the President for pre-tenure conduct may proceed during his tenure); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (whether the President is immune from civil actions for damages based on the President's conduct in office); *United States v. Poindexter*, 732 F. Supp. 142 (D.D.C. 1990) (whether a former President may be subpoenaed to testify as a witness in support of the defense in a criminal trial against one of his subordinates).

this Court to hear the President's claims, and neither of the District Attorney's objections to this Court's exercise of that jurisdiction has merit. *First*, the Anti-Injunction Act, 28 U.S.C. § 2283, is inapplicable here, where the President's claims are brought pursuant to 42 U.S.C. § 1983, an express statutory cause of action for individuals alleging that persons acting under color of state law are depriving them of federal constitutional rights, privileges, or immunities. *Mitchum v. Foster*, 407 U.S. 225, 242-43 (1972). *Second*, although federal courts sometimes abstain in suits seeking to enjoin pending state criminal proceedings, *see Younger v. Harris*, 401 U.S. 37 (1971), the comity interests underlying that abstention doctrine must give way to the concerns under Article II and the Supremacy Clause posed by a state grand jury subpoena claimed to be targeting the sitting President. Given the President's "unique position in the constitutional scheme," "the high respect that is owed to the office of the Chief Executive is a matter that should inform the conduct of the entire proceeding." *See Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 382, 385 (2004).

Because the District Attorney's threshold procedural objections are flawed, this Court must resolve the merits of the President's claims. The United States thus respectfully renews its request that the Court enter a briefing schedule that will permit the type of considered deliberation appropriate for the serious constitutional issues at stake in this proceeding, and also enter interim relief as necessary to preserve the status quo pending that deliberation (if the parties cannot negotiate a production schedule for the subpoena that would enable a timely resolution of the claims presented here). Doing so will prevent irreparable harm to the President's asserted constitutional interest in not having his records subjected to state criminal compulsory process in these circumstances, while the District Attorney has identified no prejudice from a short delay to this discrete portion of the grand jury investigation at issue.

Subject-Matter Jurisdiction. This Court possesses subject-matter jurisdiction over the President's claims under 28 U.S.C. § 1331, the general federal-question jurisdiction statute, and 28 U.S.C. § 1343(a)(3), which vests the Court with jurisdiction over civil suits "[t]o redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States . . . ." Contrary to the District Attorney's suggestion, the Anti-Injunction Act, 28 U.S.C. § 2283, does not deprive the President of a federal forum for the litigation of his federal constitutional claims.

The Anti-Injunction Act's limitation on federal injunctions to stay "proceedings in a State court" has no application here, even assuming *arguendo* that a grand jury subpoena constitutes a state court "proceeding." By its own terms, the Anti-Injunction Act does not apply when a suit for injunctive relief is "expressly authorized by Act of Congress." 28 U.S.C. § 2283. One such statute is 42 U.S.C. § 1983, which authorizes a "suit in equity" if persons acting "under color of any statute, ordinance, regulation, custom, or usage, of any State" allegedly are causing an individual to be subjected to "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." The Supreme Court has squarely held that Section 1983 comes within the express-authorization exception to the Anti-Injunction Act and that federal courts thus possess the power to enjoin state court prosecutions under that statute. *Mitchum*, 407 U.S. at 242-43.

Here, the President is invoking Section 1983 to challenge a deprivation by the District Attorney of "rights, privileges, or immunities secured by the Constitution"—specifically, a freedom from enforcement of the subpoena that is claimed to be secured to the President, and the President alone, by Article II of the Constitution. *See* Pl's Amend. Compl. ¶ 8. The Supreme Court consistently "ha[s] rejected attempts to limit the types of constitutional rights that are encompassed within the phrase 'rights, privileges, or immunities'" in Section 1983. *Dennis v.*

Higgins, 498 U.S. 439, 445 (1991). And the Court has made clear in particular that Section 1983 actions may be predicated not only on the kinds of right-conferring provisions found in the Bill of Rights, but also on grants of authority to the federal government that correspondingly constrain state governments. *See id.* at 446-51 (dormant Commerce Clause claims may be brought under Section 1983). Here, Article II confers "rights, privileges, [and] immunities" on the President, and he claims that those rights are infringed by the District Attorney's enforcement of the challenged subpoena under color of New York law. That claim is cognizable under Section 1983. Accordingly, the Anti-Injunction Act does not bar the President's suit.[3]

Abstention. Nor is the District Attorney correct that this Court should refrain from exercising its jurisdiction under the doctrine of *Younger* abstention. The most basic and fundamental flaw with the District Attorney's position is that *Younger* is rooted in principles of comity and federalism, which lose their force when the federal government's own Chief Executive invokes federal constitutional law to challenge a state grand jury subpoena demanding his records. Indeed, both Congress and the Supreme Court have made clear that federal objections to state proceedings of the type raised by the President should be adjudicated in federal rather than state court—a proposition that is compelled by both constitutional design and common sense.

The Supreme Court has described *Younger* abstention as an "exceptional" departure from federal courts' "virtually unflagging" "obligation" to exercise jurisdiction conferred by Congress despite the pendency of related proceedings in state court. *See Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013). Like other federal abstention doctrines, *Younger* abstention is ultimately grounded "in the historic discretion exercised by federal courts 'sitting in equity.'" *Quackenbush*

[3] Because this suit comes within one of the express statutory exceptions to the Anti-Injunction Act, the Court need not address whether the suit is also covered by the judicially created exception for injunctive actions by the federal government. *See Mitchum*, 407 U.S. at 235-36 & n.20.

v. Allstate Ins. Co., 517 U.S. 706, 718 (1996). In the case of *Younger* abstention, when a plaintiff asks a federal court to enjoin a pending state criminal proceeding, principles of "comity" and "[f]ederalism" generally call for the federal court to exercise that equitable discretion in favor of abstention. *Younger*, 401 U.S. at 44.

But, reflecting its exceptional nature, *Younger* has important limitations. *See Sprint Commc'ns, Inc.*, 571 U.S. at 73. Even when a plaintiff is seeking to enjoin an ongoing state criminal proceeding, "a federal court may nevertheless intervene in [the] state proceeding upon a showing of 'bad faith, harassment or any other unusual circumstance that would call for equitable relief.'" *Diamond "D" Const. Corp. v. McGowan*, 282 F.3d 191, 198 (2d Cir. 2002) (quoting *Younger*, 401 U.S. at 54); *see also Kugler v. Helfant*, 421 U.S. 117, 124–25 (1975) (federal court may intervene when there is "an extraordinarily pressing need for immediate federal equitable relief"). Likewise, a federal court may intervene if "the state proceedings [do not] afford an adequate opportunity to raise the constitutional claims." *Moore v. Sims*, 442 U.S. 415, 430 (1979). In each of these circumstances, principles of comity and federalism give way to countervailing considerations in the exercise of the court's equitable discretion. So too here.

The District Attorney asks this Court to substantially extend *Younger* to shut the doors of the federal courts to the President of the United States, but the principles of federalism and comity that undergird *Younger* abstention provide no support for that unprecedented step. To the contrary, federalism and comity militate decisively in favor of ensuring that the President has a federal forum in which to litigate federal claims that a state criminal subpoena is impermissibly trenching on his constitutional role in violation of Article II and the Supremacy Clause. Remitting the sitting President to state court would turn notions of federalism and comity on their head, and would ignore "'the unique position [the President occupies] in the constitutional scheme.'" *Cheney*, 542

U.S. at 382 (quoting *Fitzgerald*, 457 U.S. at 749); *see also id.* at 381-82 ("[I]n no case . . . would a court be required to proceed against the president as against an ordinary individual." (quoting *United States v. Burr*, 25 F. Cas. 187, 192 (CC Va. 1807) (Marshall, C.J.))). Indeed, contrary to the Supreme Court's admonition that *Younger* abstention is limited to "exceptional circumstances" where abstention is warranted, refusing even to consider a sitting President's federal constitutional challenge to a state criminal subpoena demanding his own records would be a particularly inappropriate derogation of what the Court described as the "virtually unflagging" "obligation" to exercise jurisdiction where, as here, jurisdiction exists, notwithstanding the pendency of a state proceeding. *Sprint Commc'ns, Inc.*, 571 U.S. at 77.[4]

The Supreme Court has long recognized that "the high respect that is owed to the office of the Chief Executive . . . should inform the conduct of [an] entire proceeding" implicating the autonomy of his office. *Cheney*, 542 U.S. at 385 (quoting *Clinton*, 520 U.S. at 707). That respect is in fact demanded by our constitutional design. While the Constitution vests the legislative and judicial powers in collective bodies, "the executive Power" is vested in the President alone. *Fitzgerald*, 457 U.S. at 749-50. His office, unlike those of other executive officers, is not dependent on Congress for its existence or its powers. The Constitution itself "entrust[s] [the President] with supervisory and policy responsibilities of utmost discretion and sensitivity." *Id.* at 750. And it is he alone "who is charged constitutionally to 'take Care that the Laws be faithfully executed.'" *Id.*; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (Take Care Clause constitutes "the Chief Executive's most important constitutional duty."). The President serves as "the sole organ of the federal government in the field of international relations," *United*

[4] The United States is unaware of any circumstance where a federal court has applied *Younger* abstention to a challenge to a state grand jury subpoena demanding a sitting President's records, and the District Attorney identifies none.

States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936), and his "duties as Commander in Chief . . . require him to take responsible and continuing action to superintend the military," *Loving v. United States*, 517 U.S. 748, 772 (1996); *see also* U.S. Const., art. II, § 2, cl. 2. In the words of former President Truman, "every final important decision has to be made right here on the President's desk, and only the President can make it." Edward Corwin, *The President: Office and Power*s, 1787-1984 (1984).

In constitutional and practical terms, the demands placed on the President under Article II are unceasing. *See Clinton*, 520 U.S. at 697 (The President "occupies a unique office with powers and responsibilities so vast and important that the public interest demands that he devote his undivided time and attention to his public duties."). Our system of government presumes that the President will have ultimate authority over the actions of officials within the Executive Branch. *Cf. Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (deference to unelected agency officials is justified because "[w]hile agencies are not directly accountable to the people, the Chief Executive is"); *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 496-97 (2010) (reaffirming "the basic principle that the President 'cannot delegate ultimate responsibility or the active obligation to supervise that goes with it,' because Article II 'makes a single President responsible for the actions of the Executive Branch.'" (quoting *Clinton*, 520 U.S. at 712-13 (Breyer, J., concurring in judgment)). In both the demands it places on its occupant and the accountability it expects of him, the presidency is a singular office.

The unceasing nature of the President's duties is reflected in the constitutional structure of his office. In contrast to the Congress, which is required to assemble only "once in every Year" (Const. Art. I, § 4) and which may adjourn on a regular basis (*id.* § 5), the President must attend to his duties as Chief Executive and Commander-in-Chief continuously throughout his tenure. The

Twenty-Fifth Amendment, with its elaborate machinery for carrying out the President's functions when he "is unable to discharge the powers and duties of his office," confirms that constitutional imperative. *See Clinton*, 520 U.S. at 698 ("[T]he Twenty-fifth Amendment to the Constitution was adopted to ensure continuity in the performance of the powers and duties of the office."). "One of the sponsors of that Amendment stressed the importance of providing that 'at all times' there be a President 'who has complete control and will be able to perform' those duties." *Id.* (quoting 111 Cong. Rec. 15595 (1965) (remarks of Sen. Bayh)).

Given the unique character of the President's office and his responsibilities in the Nation's constitutional structure, a proper understanding of comity requires a federal court in these circumstances to exercise its jurisdiction rather than abstain. "Comity generally refers to the respect that [federal courts] accord a state court[,] [b]ut comity is a two-way street." *Commodities Exp. Co. v. Detroit Int'l Bridge Co.*, 695 F.3d 518, 527 (6th Cir. 2012). When a local prosecutor takes the extraordinary step of issuing compulsory process in a state criminal investigation that demands the personal records of a sitting President, comity calls for preserving the availability of a federal forum to challenge enforcement of that subpoena, particularly given that the President's constitutional claims implicate the very relationship between the federal and state governments under the Supremacy Clause. *Cf. Moore*, 442 U.S. at 430 (plaintiff may obtain relief in federal court if "the state proceedings [do not] afford an adequate opportunity to raise the constitutional claims."). And by the same token, the state's interest in litigating such an unusual dispute in a state forum is minimal.

Indeed, both the Supreme Court and Congress have effectively already made clear that the type of claims the President has raised ought to be adjudicated in federal rather than state court. As for the Supreme Court, it has recognized an *implied exception* to the Anti-Injunction Act's

express prohibition for suits by the federal government seeking injunctions against state-court proceedings. *See supra* at 4, n.3. It follows directly that the Court would not *extend Younger* abstention's *implied limitation* on the Section 1983 cause of action to a suit *by the President* seeking injunctive relief against state criminal proceedings in order to vindicate his constitutional rights, privileges, and immunities under Article II.

As for Congress, not only has it authorized Section 1983 suits, but it has also authorized federal officers to remove from state court to federal court any "civil action or criminal prosecution . . . against or directed to . . . any officer . . . of the United States for or relating to any act under color of such office," so long as the officer is asserting a federal defense to the action. *See* 28 U.S.C. § 1442(a)(1); *Mesa v. California*, 489 U.S. 121, 124-25 (1989). That is important because, if the state grand jury had issued a subpoena to the President himself, the President could have taken measures enabling him to invoke Section 1442 to contest the validity of the subpoena in federal court—namely, by declining to comply on the basis of Article II and the Supremacy Clause, waiting for the commencement of a subpoena enforcement proceeding in state court, and then removing that proceeding under Section 1442 on the ground that the subpoena enforcement action would relate to his "act" of declining to comply with the subpoena "under color" of his assertion of the constitutional authority of his office. Yet, as the Supreme Court has recognized, "[t]o require a President of the United States to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review of the ruling would be unseemly." *United States v. Nixon*, 418 U.S. 683, 691–92 (1974). For that reason, the *Nixon* Court allowed the President to appeal from the denial of an order to quash a subpoena without requiring the President to go into contempt. *Id.* A federal court likewise should not require a President to trigger a state-

court subpoena enforcement proceeding before he can bring his objections to the subpoena before a federal court.

To be sure, the grand jury in this matter has sought the President's records by subpoenaing his third-party accountant rather than the President himself, but that is not a material distinction for purposes of *Younger* abstention. As the President is undoubtedly entitled to review in federal court when the state prosecutor seeks his records directly from him, the President should not lose access to that federal forum simply because the President's records are sought from a third-party custodian. *Cf. Judicial Watch, Inc. v. U.S. Secret Service*, 726 F.3d 208, 225 (D.C. Cir. 2013) (FOIA exemption for White House records extends to Secret Service records concerning White House entry). And that is especially so given that a President's personal and business interests would normally be expected to require placing his financial records in the custody of a third-party accountant. The burden on the President's time and attention is no less in that posture, given that he would not be expected to personally compile the requested records even if the subpoena were issued to him directly.

In sum, this Court should hold that the President's federal constitutional claims challenging the state grand jury subpoena at issue are properly adjudicated in federal court. The United States further respectfully requests that this Court adopt an appropriate briefing schedule to resolve the President's significant constitutional claims, and enter any interim relief necessary to maintain the status quo pending orderly resolution of those claims.

Respectfully submitted,

GEOFFREY S. BERMAN
United States Attorney

JEFFREY OESTERICHER
Chief, Civil Division

JOSEPH H. HUNT
Assistant Attorney General

JAMES M. BURNHAM
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Director, Federal Programs Branch

ELIZABETH J. SHAPIRO
Deputy Director,
Federal Programs Branch

JOSHUA E. GARDNER

/s/ Joshua E. Gardner
Special Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, D.C. 20005
Telephone: (202) 305-7583
Facsimile: (202) 616-8470
Email:
Joshua.E.Gardner@usdoj.gov

Counsel for the United States

OCTOBER 2, 2019